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1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF WEST VIRGINIA
 3 AT CLARKSBURG

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4 CHRISTY J. RHOADES, in her CIVIL ACTION NO. 1:18-CV-186
 5 capacity as the Administratrix
 6 and Personal Representative of
 the estate of Philip Jontz
 Rhoades,

7 Plaintiff,

8 V.

9 DAVID FORSYTH, in his official
 10 and individual capacity,

11 Defendant.

- - -

12 Proceedings had in the Jury Trial of the above-styled
 13 action on Friday, April 9, 2021, before the Honorable Judge
 Thomas S. Klee, District Judge, at Clarksburg, West Virginia.

- - -

14 APPEARANCES:

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INDEX

RULE 50 MOTION

By Mr. Carroll.....3

DEFENSE WITNESS: SAMUEL FAULKNER

Direct examination by Ms. Durst.....21

Cross-examination by Mr. Umina.....74

CLOSING ARGUMENT

By Mr. Umina.....157

By Ms. Durst.....184

VERDICT.....226

1 (Proceedings commenced at 9:09 a.m., in open court.)

09:09:11 2 THE COURT: Good morning, everyone. Please be
09:09:13 3 seated. All right.

09:09:17 4 So we are here on day four of trial proceedings in the
09:09:22 5 matter of Rhoades v. Forsyth, 1:18-cv-186. At the conclusion
09:09:31 6 yesterday, the plaintiff rested.

09:09:32 7 Any motions at this point?

09:09:34 8 MR. CARROLL: Your Honor, we would like to present a
09:09:36 9 Rule 50 motion for judgement as a matter of law at this point.

09:09:39 10 THE COURT: You may proceed, sir.

09:09:41 11 MR. CARROLL: Thank you, Your Honor. There are four
09:09:42 12 components to our motion. We are moving to dismiss the
09:09:45 13 punitive damages, excessive force claim, intentional
09:09:47 14 infliction of emotional distress, and wrongful death. That is
09:09:50 15 all the plaintiff's claims at this time.

09:09:53 16 With regards to punitive damages, Congress created the
09:09:57 17 1983 to create a cause of action including excessive force;
09:10:01 18 however, Congress did not specifically create punitive
09:10:05 19 damages. That was attached by the Supreme Court through the
09:10:10 20 case *Smith v. Wade*, that's 461 U.S. 30. And under *Smith*, the
09:10:15 21 case law is for punitive damages. To be applicable, the
09:10:20 22 defendant's conduct must be motivated by evil motive or
09:10:23 23 intent, or involve reckless or callous indifference.

09:10:26 24 In this case, the jury has not heard any testimony of any
09:10:29 25 events preceding the afternoon of August 2nd, 2017. There is

no evidence of any motive. There is no evidence of any intent. And there is nothing to suggest indifference on behalf of the part of the defendant. Essentially, we are talking about a 16-second window. That is not enough time for any juror to reasonably infer motive, intent, or indifference. For that reason, as a matter of law, we believe the punitive damages claim must be dismissed.

Regarding the excessive force, we would rely on the case law that we presented in our motion for summary judgment; however, I would reiterate that under *Pritchard vs. Alford* the determination of whether a reasonable person in the officer's position would have known that his conduct would violate the right at issue, must be made in light of any exigencies at the time and circumstances that reasonably may have affected the officer's perceptions.

The only objective evidence in this case to support plaintiff's theory would be the fact that the Jeep that Philip Rhoades was driving was running and in gear, which is an impossibility based off of all of the testimony from the witnesses in this trial. From there, plaintiff relies on his expert opinion, and his expert opinion essentially says that the evidence at the scene is inconsistent with the defendant's statements. And that the timeline of the incident is inconsistent with the, again, Deputy Forsyth's statements. Both of those are -- point to inconsistencies, but do not

09:12:00 1 provide any objective evidence to support. Essentially, they
09:12:02 2 say that the defendant's theory of the case is not consistent,
09:12:05 3 but it doesn't say that excessive force has objectively
09:12:09 4 occurred. For that reason, we do not believe that a
09:12:12 5 reasonable jury could find that excessive force -- the
09:12:16 6 elements for excessive force have been met in this case.

09:12:19 7 I will also point out that plaintiff's expert has made an
09:12:22 8 opinion on the tactics and the actions of Defendant Forsyth.
09:12:26 9 To the extent that he has made that argument, and this is a
09:12:30 10 quote that I have from Mr. Roof, it was that Forsyth's
09:12:34 11 decision -- and my quote is, "It wasn't tactically sound, but
09:12:38 12 he did not know any better." Your Honor, that is no
09:12:41 13 indication of motive, intent. That is simply, at best, a
09:12:44 14 negligence claim. And under excessive force, officers have
09:12:48 15 the right to make reasonable errors.

09:12:51 16 Finally, with regards to -- well, I will say the third,
09:12:54 17 intentional infliction of emotional distress, that is the
09:12:58 18 state law claim, that is the initial question of whether
09:13:01 19 intentional infliction of emotional distress, if permitted to
09:13:05 20 go to the jury, is a legal question. And the hallmark of
09:13:07 21 intentional infliction of emotional distress is extreme or
09:13:10 22 outrageous conduct. Again, to the extent that we have heard
09:13:13 23 that death would have essentially been instantaneous in this
09:13:17 24 case, there would not be any emotional distress.

09:13:20 25 More importantly, Your Honor, the claim for severe

emotional distress arising out of Defendant Forsyth's conduct is a personal injury claim. And in that sense, it is governed by the two-year statute of limitations, which is pursuant to West Virginia Code, Section 55-2-12(b). However, the West Virginia court in *Courtney v. Courtney* -- that is 190 W. VA. 126. It is a 1993 case -- the *Courtney* decision makes clear that a claim for emotional distress only survives the death of a plaintiff where the alleged tortuous conduct does not result in the death of the plaintiff.

Here what we have is a case where the alleged tortuous conduct, the use of excessive force, is the cause of Philip Rhoades' death; therefore, it does not survive Philip Rhoades' death.

In the Northern District of West Virginia there is an unpublished opinion, this is a trial court decision, that is *Hoover vs. Trent*, and the docket number is 1:07-CV-47, and the elective citation for that case is 2008 U.S. DIST LEXIS 58447. And that is a Northern District of West Virginia 2008. In the *Hoover* decision the decedent was an inmate who passed away as a result of hypothermia in jail. The estate sued, alleging wrongful death and intentional infliction of emotional distress in that case. In addressing which claims survived the death of the decedent, the Court noted that West Virginia Code 55-7-8(a) only allows for the survival of personal injuries that do not result in death. So I think that is

09:15:11 1 established here today, and plaintiff cannot pursue it any
09:15:13 2 further, intentional infliction of emotional -- intentional
09:15:18 3 infliction of emotional distress claims.

09:15:20 4 And lastly, the wrongful death claim, it is a derivative
09:15:24 5 claim to the extent that the prior two claims are dismissed,
09:15:26 6 the wrongful claim -- - --

09:15:27 7 THE COURT: Any other basis defendant moves under
09:15:31 8 Rule 50 with respect to the wrongful death claim other than
09:15:34 9 derivative of the other three claims?

09:15:36 10 MR. CARROLL: -- no, Your Honor.

09:15:37 11 THE COURT: Understood.

09:15:38 12 MR. CARROLL: And we would reserve the right to make
09:15:39 13 a Rule 50 motion on qualified immunity at the close of our
09:15:43 14 case in chief; however, I don't believe it's appropriate at
09:15:45 15 this time.

09:15:45 16 THE COURT: Understood.

09:15:47 17 MR. CARROLL: Thank you, Your Honor.

09:15:47 18 THE COURT: Thank you, Mr. Carroll.

09:15:48 19 Counsel.

09:15:48 20 MR. UMINA: Your Honor, under Rule 50, the facts are
09:15:54 21 viewed in a light favorable to the non-moving party. As to
09:15:58 22 the punitive damages claim, Your Honor, as counsel points out,
09:16:03 23 requires a reckless indifference.

09:16:05 24 In this matter, Your Honor, simply a finding of liability
09:16:10 25 requires either a reckless indifference to the rights of Mr.

09:16:15 1 Rhoades, or intent. And if that -- if we are at intent, most
09:16:21 2 certainly taking someone's life has an evil motive behind it.
09:16:25 3 So, Your Honor, as to punitive damages, the Court has been
09:16:28 4 fully briefed on the applicable case law, and prior -- and
09:16:32 5 prior pleadings in this Court.

09:16:34 6 Most certainly the jury is entitled to consider punitive
09:16:38 7 damages. And again, the theory of the plaintiff is that the
09:16:44 8 defendant jumped out of his vehicle and knowingly and
09:16:49 9 intentionally utilized lethal force when it wasn't permitted
09:16:54 10 by his own policy or by the Constitution of the United States
09:16:56 11 of America, Your Honor. And that callous indifference to the
09:17:01 12 policies that govern him and to the constitutional
09:17:04 13 requirements for using lethal force, most certainly rise to
09:17:10 14 the level of the plaintiff being entitled to punitive damages.

09:17:14 15 As to the excessive force claim, Your Honor, opposing
09:17:19 16 counsel pointed out a number of facts that would go to
09:17:22 17 indicate that the defendant did, in fact, utilize excessive
09:17:28 18 force. He points out that there was a timeline that was put
09:17:33 19 into evidence in this case that would indicate that the
09:17:36 20 defendant's version of events could not have occurred in the
09:17:40 21 manner in which he claims.

09:17:41 22 Additionally, they point out that the vehicle was running
09:17:44 23 and in neutral, and as we have heard from nearly every single
09:17:48 24 person who testified other than the Rhoades' family, a vehicle
09:17:52 25 could not be running and in gear 52 minutes after the

09:17:57 1 shooting. And there has been no evidence, not a single piece
09:18:00 2 of evidence, offered as to how the vehicle got out of neutral,
09:18:07 3 out of gear at the time of the shooting.

09:18:14 4 Your Honor, there has also been -- I was just passed a
09:18:22 5 note by my co-counsel. I just want to add to punitive
09:18:26 6 damages. The intent, motive, and deliberate indifference
09:18:29 7 would also be demonstrated by the coverup that we have argued
09:18:32 8 here and the fact that the defendant intentionally intended to
09:18:36 9 cover up his actions and, in fact, worked with another member
09:18:40 10 of the department, the only witness to the scene, to cover up
09:18:44 11 these actions. That would also go to punitive damages.

09:18:46 12 Turning back to the excessive force argument, they made a
09:18:51 13 statement that the tactics used were not proper, but he didn't
09:18:57 14 know any better. That statement wasn't made about Mr.
09:19:00 15 Forsyth. That statement was made about Mr. Love. We were
09:19:03 16 specifically talking about him going towards the front of the
09:19:06 17 vehicle. So again, that had nothing to do with Mr. Forsyth.
09:19:11 18 So certainly the vehicle running and in neutral, there being
09:19:15 19 no evidence of that vehicle being taken out of gear by anyone
09:19:18 20 including the defendant, as he has testified, the timeline of
09:19:22 21 events, the fact that there was no ground disturbance on the
09:19:26 22 scene to support his claim that the tires were spinning and
09:19:30 23 the engine was revving, Your Honor, we have certainly put
09:19:33 24 forth enough evidence to show that his version of events did
09:19:35 25 not happen. He took the life of someone sitting in a vehicle

09:19:38 1 in neutral.

09:19:39 2 As to the intentional infliction of emotional distress,
09:19:44 3 most certainly taking a .40-caliber pistol and shooting at
09:19:49 4 someone seven times is extreme and outrageous unless your life
09:19:53 5 is actually in danger, and again, the evidence here does not
09:19:53 6 suggest that it was.

09:19:54 7 As to the law cited by the defendant, none of that law
09:19:58 8 sounded like it was binding on this Court. If the Court --

09:20:02 9 THE COURT: How is it not.

09:20:03 10 MR. UMINA: He cited a Northern District of West
09:20:07 11 Virginia case. Now, if the Courtney case does, in fact, say
09:20:10 12 what it does, and it is still good law, then, Your Honor,
09:20:13 13 frankly we don't have much of an argument here. And I will
09:20:17 14 concede that. But in the event there is any exception to that
09:20:20 15 rule, we have certainly put forth enough evidence of
09:20:22 16 intentional infliction of emotional distress.

09:20:25 17 And as to the wrongful death claim, I'm not sure that he
09:20:29 18 actually -- I am not sure there is really an argument to
09:20:31 19 address. He said it is derivative of the other claims. We
09:20:34 20 made sufficient arguments to each of other claims, Your Honor.

09:20:37 21 THE COURT: Understood. Thank you, Mr. Umina.

09:20:38 22 Mr. Carroll.

09:20:39 23 MR. CARROLL: Your Honor, I would only point out,
09:20:42 24 particularly in the context of punitive damages claims, that
09:20:45 25 the plaintiff has not identified, or I don't believe there is

any significant evidence that was taken of Defendant Forsyth of anything that happened after the shooting. So to the extent that there was a coverup or even looking into what happened to the Jeep and how it got into neutral, or anything of that nature, I don't believe that is properly in the record.

I would also point out, to the extent that an alleged coverup would be the basis of a punitive damages claim, it seems to me that that would be related to *Mone*¹¹. That is something that happened after the shooting here on the 1983 excessive force, and I don't believe that we can create a punitive damages claim for something that occurred after the use of force was used. Thank you, Your Honor.

THE COURT: Understood. Thank you, counsel. The Court will deny the motion on the excessive force claim. I certainly believe the record that has been established during the plaintiff's case in chief, presents a legally sufficient evidentiary basis, which of course is our standard here. And as Mr. Umina appropriately points out, the Court is required to view the evidence in the light most favorable to the non-movement, and that includes inferences. I do believe there is sufficient evidence for a jury to return a verdict in favor of the plaintiff on the excessive force claim.

Hand in hand with that with respect to punitive damages, I spent a good bit of time yesterday diving into that issue,

09:22:11 1 anticipating this conversation this morning. I do think
09:22:14 2 counsel has correctly identified the standard, which is evil
09:22:19 3 motive or intent, or when the situation involves reckless,
09:22:22 4 callous indifference to the federally protected rights of
09:22:26 5 others. There is plenty of cases -- and I will get an actual
09:22:31 6 order in reflecting our rulings here this morning -- talking
09:22:34 7 about how close in hand, if you will, liability on an
09:22:39 8 excessive force claim under 1983 is with punitive damages.
09:22:42 9 Doesn't make it automatic if liability is found, but the
09:22:47 10 standard is relatively the same. So given the Court's ruling
09:22:53 11 on the excessive force claim, the Court would likewise deny
09:22:56 12 the motion with respect to the punitive damages aspect of the
09:23:00 13 1983 claim. Putting aside the evil motive or intent, I think
09:23:07 14 there is a legally sufficient evidentiary basis to support a
09:23:10 15 finding by the jury with respect to potentially reckless or
09:23:14 16 callous indifference behavior here, again, looking at the
09:23:18 17 evidence in the light most favorable to the non-movement,
09:23:22 18 which at this point is the plaintiff.

09:23:25 19 With respect to -- well, let's put the intentional
09:23:30 20 infliction to the side for the moment. Given the Court's
09:23:34 21 ruling on the excessive force claim, the Court would likewise
09:23:36 22 deny the motion with respect to the wrongful death claim given
09:23:39 23 that it's derivative of 1983.

09:23:41 24 The Court will grant the motion with respect to the
09:23:43 25 intentional infliction of emotional stress claim for two

09:23:46 1 reasons. First, I believe Mr. Carroll is correct. It's not a
09:23:51 2 survivable claim given the death of Mr. Rhoades here. That is
09:23:56 3 a claim that belonged to him, and that claim expired upon his
09:24:01 4 passing. And also recognizing as an alternative basis, it's
09:24:07 5 this Court's duty as an additional matter, to determine if the
09:24:12 6 conduct involved is so atrocious, so extreme, and so
09:24:16 7 outrageous that it cannot be tolerated in society, and again,
09:24:19 8 I recognize why we are here, and that Mr. Rhoades is not with
09:24:23 9 us, and that is why we are here, but the facts and
09:24:26 10 circumstances of what led to his death are also why we are
09:24:31 11 here. And this Court can't, as a matter of law, declare the
09:24:33 12 actions that occurred on August 2nd so atrocious and so
09:24:37 13 extreme given law enforcement's involvement and the evidence
09:24:42 14 in dispute here.

09:24:44 15 So for those two reasons, the survivability and the
09:24:47 16 initial legal threshold, the Court would grant the motion on
09:24:50 17 the intentional infliction of emotional distress claim.
09:24:54 18 Objections respectively noted with respect to the Court's
09:24:58 19 rulings.

09:24:59 20 Any other motions we need to take up at this point?

09:25:03 21 MR. CARROLL: Nothing further, Your Honor.

09:25:04 22 THE COURT: Mr. Umina, any motions for plaintiff?

09:25:05 23 MR. UMINA: Not in this regard, Your Honor. Prior to
09:25:10 24 Mr. Faulkner testifying, we would like to talk about the way
09:25:14 25 in which his opinions are phrased in terms of the Court's

09:25:18 1 rulings in this matter.

09:25:21 2 Would you like us to address that now, Your Honor?

09:25:23 3 THE COURT: Let's put a pin in that and come back
09:25:26 4 around to it, but don't let me leave before we talk about it.

09:25:29 5 Let me ask this question at this point as we are
09:25:33 6 finalizing our charge: First question off the top, is there
09:25:36 7 any dispute with respect to the state actor under state --
09:25:44 8 "under color" of state law element at this point?

09:25:46 9 MR. UMINA: We stipulated to that previously.

09:25:47 10 THE COURT: Is that accurate?

09:25:49 11 MS. DURST: It is, Your Honor.

09:25:49 12 THE COURT: All right. We will make sure our charge
09:25:53 13 reflects that.

09:26:04 14 Mr. Umina, go ahead.

09:26:06 15 MR. UMINA: Your Honor, in this case, Mr. Faulkner,
09:26:16 16 we found a number of opinions, but only two have survived
09:26:22 17 motions in limine hearings, but his first opinion, "Deputy
09:26:26 18 Forsyth did his duty and placed himself in harm's way when he
09:26:30 19 responded to a high risk pursuit of a dangerous fleeing
09:26:35 20 felon." We take issue with the words "dangerous, fleeing
09:26:39 21 felon," and especially the word "felon." We have no issue
09:26:43 22 with him using "high risk traffic stop." And additionally, a
09:26:48 23 high risk traffic stop and a felony traffic stop are
09:26:52 24 synonymous terms. So I think it would be misleading to the
09:26:56 25 jury especially in light of the Court's rulings, to refer to

09:27:00 1 it as a felony traffic stop. We have no issue with him
09:27:03 2 calling it a high risk traffic stop.

09:27:05 3 And also, calling Mr. Rhoades himself dangerous. You
09:27:11 4 know, again, we realize that he -- that he had information,
09:27:16 5 the defendant had information at the time that he may be
09:27:19 6 armed, but that information was not true. So to just
09:27:23 7 inherently call him dangerous, I don't think it's proper,
09:27:26 8 especially in light of the Court's rulings.

09:27:31 9 And additionally, Deputy Forsyth's response to Mr.
09:27:35 10 Rhoades placing members of the general public at risk of death
09:27:39 11 or serious bodily harm after attempting to run over the
09:27:42 12 deputy, complying with Supreme Court guidelines. First, it's
09:27:48 13 highly misleading that he was placing members of the general
09:27:51 14 public at risk or death, especially when you look at the
09:27:55 15 requirements under the Marion County Sheriff's Department use
09:27:58 16 of force policy. That threat has to be imminent. And how
09:28:02 17 imminent is defined is that it is perceived to be unavoidable.
09:28:08 18 There is --

09:28:09 19 THE COURT: Do we have any evidence that anyone else
09:28:11 20 was anywhere in the path or near the chase?

09:28:17 21 MS. DURST: In the initial pursuit -- yes, Your
09:28:20 22 Honor, Deputy Forsyth testified from the witness stand that
09:28:22 23 when he initially saw the Jeep on Route 250, Mr. Rhoades
09:28:27 24 swerved into oncoming traffic, almost hit a vehicle in the
09:28:31 25 oncoming lane, as Deputy Forsyth turned around to pursue him.

09:28:36 1 There was also the civilian vehicle near where they found the
09:28:39 2 access road. If you remember, Deputy Forsyth had to wait for
09:28:43 3 that civilian vehicle to pull by. So there is evidence of
09:28:47 4 that, Your Honor.

09:28:47 5 THE COURT: Understood. Go ahead, Mr. Umina.

09:28:47 6 MR. UMINA: Again, that threat has to be imminent.
09:28:50 7 It's not somebody is down the road or he passed somebody
09:28:53 8 earlier. There would have had to have been someone that it
09:28:57 9 appeared to the defendant that but for shooting him, there was
09:29:02 10 an unavoidable threat of serious injury or bodily harm. No
09:29:08 11 members of the public were anywhere near there, even by their
09:29:11 12 own testimony. There was no unavoidable threat to the public
09:29:13 13 that was perceived to be immediate. So the characterization
09:29:20 14 of him placing members of the general public at risk of death
09:29:24 15 or serious bodily harm, that is the verbiage from the use of
09:29:28 16 force policy, but again, this is highly misleading because
09:29:32 17 that doesn't -- just stating that, doesn't get them there. It
09:29:36 18 has to be a -- perceived to be an immediate, unavoidable
09:29:41 19 threat. And --

09:29:45 20 THE COURT: Tell me about the trying to run over the
09:29:48 21 deputy portion of that.

09:29:51 22 MR. UMINA: Yes, Your Honor. It says -- it says
09:29:54 23 after attempting to run over the deputy. Again --

09:30:02 24 THE COURT: Is that related to July 25th?

09:30:06 25 MR. UMINA: I know that he most certainly -- that is

another issue with both of these. He mentions July 25th. I want to make sure...

THE COURT: Well, we're not talking about July 25th. That's why I am curious about this "running over the deputy."

MR. UMINA: So right here, on page 14 of the initial opinion, Deputy Love was interviewed following Deputy Forsyth's interview. "Mr. Rhoades had attempted to run over Deputy Love on July 25th, 2017." And then he goes on and on there. So really it's kind of vague, just as I am looking at this here. And maybe they can provide some clarification, but I mean, they make mention of that, and again most certainly that is not for consideration by the jury in this case.

THE COURT: Any other issues, Mr. Umina?

MR. UMINA: No, I just wanted to make sure -- and I'm sure counsel has informed the expert of the evidentiary rulings in the case, so no other issues in that regard.

THE COURT: We're not talking about July 25th at all.

MS. DURST: No, Your Honor. Mr. Faulkner has been fully advised --

THE COURT: I am sure he has. I am sure he has.

MS. DURST: He does not intend to address that at all in regard to opinion number one, Your Honor. Mr. Faulkner has been advised that he is not to refer to Mr. Rhoades as a dangerous, fleeing felon. However, I would note that when Mr. Rhoades failed to comply, he actually -- he actually

engaged in felonious conduct directly in front of Deputy Forsyth, when he witnessed the Jeep flee, and flee in reckless disregard and almost strike an oncoming vehicle. There is a (indiscernible) component to it, but we do not intend at all, Your Honor, to refer to July 25th whatsoever.

THE COURT: Understood.

MS. DURST: The other thing, Your Honor, with regard to almost attempting to run over the officer, I will just note from the questioning of Deputy Forsyth, plaintiff's counsel did not ask Deputy Forsyth any testimony at all as to where he believed Deputy Love was. In fact, that is information -- let me proffer this, Your Honor, Mr. Faulkner met with Deputy Forsyth at the scene, which will come out in testimony, so he has information in addition to what was heard in court.

Deputy Forsyth believed that Deputy Love was behind him as the Jeep was coming forward. So Deputy Forsyth did not know where Deputy Love was, so that is also with regard to attempting, at least the reasonable belief of attempting to run over an officer, so we are not --

THE COURT: They are sort of in line, and Mr. Forsyth is at the front of the line?

MS. DURST: Well, yeah, because he exited the driver's side thinking he was going to have cover, cruiser continues to move, Deputy Forsyth [sic] exits passenger's side, starting to go around the front and, of course, the

09:33:10 1 cruiser continues to move, so Deputy Forsyth doesn't know
09:33:13 2 where Love is. But we are not going to say that there was a
09:33:17 3 prior incident where Deputy Love was almost or attempted to be
09:33:21 4 struck by a vehicle by Mr. Rhoades. We know the Court's
09:33:24 5 ruling, and we're not going to defy that ruling, Your Honor.

09:33:27 6 THE COURT: Understood. Sounds like we are on the
09:33:29 7 same the page.

09:33:30 8 MR. UMINA: Yes, sounds like it, Your Honor.

09:33:32 9 THE COURT: Well, anything else we need to discuss
09:33:35 10 this morning?

09:33:36 11 MS. DURST: Your Honor, the only other thing I would
09:33:38 12 note is Deputy Forsyth was able to get his shot, so we do not
09:33:42 13 even have to worry about advising the jury that he might be
09:33:47 14 late, because he was able to get that shot earlier this
09:33:47 15 morning.

09:33:49 16 THE COURT: All right. Outstanding.

09:33:49 17 MR. UMINA: Your Honor, I think we just need some
09:33:53 18 more clarification on opinion one because any consideration of
09:33:57 19 a car that may have passed prior to him entering the gas well
09:34:02 20 site, is irrelevant here. So any argument by them regarding
09:34:06 21 members of the general public, again, under the policy, lethal
09:34:10 22 force can only be used if they are in the immediate vicinity
09:34:13 23 and if perceived to be an unavoidable threat. So I just
09:34:16 24 wanted to get clarification --

09:34:18 25 THE COURT: I mean, you are free to cross on that

09:34:20 1 then if he advocates that their actions were appropriate, but
09:34:24 2 yet they are in violation of policy. Sounds like a
09:34:26 3 cross-examination question to me, Mr. Umina.

09:34:27 4 MR. UMINA: Okay. Your Honor. Thank you.

09:34:29 5 THE COURT: Anything else?

09:34:30 6 MS. DURST: I don't believe so, Your Honor. Thank
09:34:31 7 you.

09:34:31 8 THE COURT: Mr. Umina.

09:34:32 9 MR. UMINA: Nothing.

09:34:33 10 THE COURT: All right. Well, let's take a
09:34:35 11 five-minute personal comfort break so you guys can get
09:34:38 12 together, and then we will be ready to receive our jury.

09:34:53 13 (Break taken at this time 9:34 a.m. - 9:42 a.m.)

09:40:49 14 THE COURT: Sir, may we have our jury, please. Thank
09:40:52 15 you.

09:40:52 16 (The jury entered the courtroom, and the following
09:41:45 17 transpired in open court.)

09:41:45 18 THE COURT: Good morning, ladies and gentlemen.
09:41:47 19 Everyone please be seated. Thank you very much.

09:41:49 20 Ladies and gentlemen, again, thank you for being here
09:41:50 21 this morning. The plaintiff has concluded their presentation
09:41:58 22 and has rested, so we are now prepared to start to hear
09:42:02 23 evidence on behalf of the defendant.

09:42:03 24 With that, Ms. Durst, Mr. Carroll, you may call your
09:42:07 25 first witness.

09:42:07 1 MS. DURST: Thank you, Your Honor. The defendant
09:42:09 2 calls Sam Faulkner.

09:42:12 3 THE COURT: Mr. Faulkner, sir, if I could ask you to
09:42:13 4 step forward and pause before Madam Clerk so she can swear you
09:42:18 5 in, please.

09:42:39 6 SAMUEL D. FAULKNER, DEFENSE WITNESS, SWORN

09:42:39 7 THE COURT: Thank you, Mr. Faulkner. Sir, if you can
09:42:42 8 adjustment that microphone whenever you are comfortable.

09:42:45 9 Ms. Durst, you may proceed whenever you are ready.

09:42:47 10 MS. DURST: Thank you, Your Honor.

09:42:49 11 DIRECT EXAMINATION

09:42:49 12 BY MS. DURST:

09:42:51 13 Q. Good morning, Mr. Faulkner. Can you please identify
09:42:54 14 yourself to the jury?

09:42:55 15 A. Samuel D. Faulkner, F-a-u-l-k-n-e-r.

09:43:01 16 Q. Mr. Faulkner, where do you live? Where are you from?

09:43:04 17 A. I grew up in New Jersey, came to Ohio for college, and
09:43:08 18 then stayed there through most of my career. And then my wife
09:43:12 19 and I have moved down to Florida, which is called God's
09:43:17 20 waiting room; so we are in Florida now.

09:43:20 21 Q. Okay. Can you tell the jury -- you talked about living
09:43:26 22 in Ohio throughout most of your career. What was your career?

09:43:31 23 A. It was a law enforcement officer, and then a law
09:43:36 24 enforcement training specialist for the Ohio Attorney
09:43:39 25 General's Office.

Q. What do you mean by law enforcement training specialist?

A. Most states have what is called POST training, Peace Officers Standard Training in the governor's office. In Ohio, they have the Ohio Peace Officer Training Commission that is under the Attorney General's office, and the training section of that commission is the Ohio Peace Officer Training Academy, where I was employed.

Q. So what did you actually do through that program or that agency?

A. I did train the trainer classes. Any trainer that would train any police officer, security, corrections, bailiff, in the State of Ohio, I would have trained the trainers, and then I was sent out alone to Indiana State Police Academy, to the Pennsylvania Police Academy, to Michigan, to West Virginia. So I trained all the surrounding states and trained the trainer classes.

Q. Can you tell the jury a little bit about your involvement then as a train the trainer through the West Virginia State Police Academy?

A. The first person I became acquainted with was Trooper Sinclair, who came up to the academy and took my classes, and then he was promoted into the governor's detail, protection detail. And then it was Jess Gundy, who came up to the academy, and I trained him in all the force-related topics. He then moved up and became the commander of the training

academy. And then it was Trooper Petry, and I trained him in all the force topics. He now is in charge of the law enforcement standards division. So then it was Corporal Clark, I believe. I trained him. And then there was a trooper along with him, and Clark has moved on, and the trooper is now doing the defensive tactics, subject control training.

Q. So when you say that you train the trainers, what are you actually training the trainers to do?

A. How to instruct officers in any of the force topics from verbalization, to empty hand control, to aerosol agents, to conductive energy devices, batons, and combative firearms. So anything in the force topic.

Q. So if I am understanding correctly, you have trained the individuals at the West Virginia State Police Academy that provide training to the cadets that come there?

A. The cadets and the officers. And then I was detailed; the Academy detailed me on the Academy's request to go down and conduct train the trainer classes for officers kind of throughout the state.

Q. Okay. So with -- leaving aside the Train the Trainer, employment what -- tell the jury a little bit about your employment as a law enforcement officer.

A. I started out in 1983 in a state program of intensive supervision of adult felons. While I was doing that, I took

my law enforcement training classes, certification classes, and became a commissioned officer then with the Portage County Sheriff's Office. With their commission, I was uniform patrol at Robinson Memorial Hospital, that was kind of my first duty station. And did undercover drug work still with the detective bureau. They would use me to fly around the United States to pick up felons from other prisons to bring them back to Ohio, and warrant services. And then I moved to the city of Kent Police Department.

Q. In Ohio?

A. In Ohio. There is Kent State University. I was actually given an offer of employment by Kent State University or Kent city. My children were all young at the time, so I went with the city. And was there for about eight months, and I was doing training for officers in peace officer basic training academies in different colleges. And then I was called by the Ohio Attorney General's Office and then was hired by them, moved to London, Ohio, where I did the train the trainer classes.

Q. How many years all tolled were you in law enforcement?

A. Commissioned officer for just under 30 years.

Q. Are you retired, is that the right word?

A. Yes, ma'am. I just -- I kind of made a commitment to myself that when I turned 60, I wouldn't keep on rolling around with kids that were three times my size and one-third

of my age, so I retired from the academy at age 60. And a month before I was retired, I was hired by the Village of Mechanicsburg, as their chief of police. I gave them a five-year commitment. I served as their chief for a little over five years, retired from there, and then I just happened to be called by a Lieutenant Colonel then from the Marine Corp. And he said, Sam, you have heard about our Marines hurting themselves and other people. We are setting up a violence prevention program for the United States Marine Corp. Can we count on your assistance? I could not say no, so for the next three years, east coast, west coast, and overseas, setting up the violence prevention for the United States Marine Corp. When that was over, I then just did some training and consulting and expert witness work.

Q. Okay. And so can you tell the jury about your expert witness work. Obviously, you are here today as an expert retained on behalf of Deputy Forsyth; is that right?

A. Yes, ma'am.

Q. Okay. Can you tell the jury just a little bit about your expert witness work.

A. I started in 1990. I was just contacted by a lawyer, and that's the first time I did it. And then I did a number on my own. I did a number for the Ohio Attorney General's Office. If there was a critical incident, they would detail me out to provide expert witness testimony through my employment. And

09:49:53 1 then when I retired, I just kept on doing it on my own. I
09:49:58 2 have probably had about 450 cases now.

09:50:01 3 Q. Okay. Of those 450 cases, are those civil cases like we
09:50:06 4 are here about today?

09:50:08 5 A. The majority would be civil cases, yes, ma'am.

09:50:11 6 Q. Okay. Can you tell the jury, obviously, are you here
09:50:15 7 today serving as an expert witness working on behalf of the
09:50:19 8 defendant, who is a law enforcement officer, right?

09:50:21 9 A. Yes, ma'am.

09:50:21 10 Q. Of the approximate, whatever the number is, 450 if it's
09:50:27 11 civil cases, can you tell the jury how many of those cases
09:50:30 12 were for civil cases against law enforcement officers.

09:50:35 13 A. None civil against, ma'am.

09:50:37 14 Q. Why?

09:50:37 15 A. I am a law enforcement trainer. That was my profession.
09:50:43 16 And I am not saying they always do it right. I have attorneys
09:50:47 17 call me frequently. I will talk to anybody about what
09:50:51 18 training is or what standards are. I just choose -- just
09:50:56 19 ethically, I just don't take cases, civil cases, against law
09:50:59 20 enforcement.

09:51:00 21 If they are wrong, I will tell the counselor. I will
09:51:03 22 say, "Counselor, if you can prove that, you don't need me."
09:51:06 23 But I just choose not to take cases against law enforcement.

09:51:10 24 Q. What about criminal cases?

09:51:11 25 A. I have taken a number of criminal cases against law

1 enforcement. Their actions were so egregious we had to get
2 them out of law enforcement.

3 Q. Okay. We have already established that I retained your
4 services here today; is that right?

5 A. Yes, ma'am.

6 Q. Have you and I ever worked together on any cases before
7 this case?

8 A. This is the first case.

9 Q. Okay. And in all fairness, have you had any other cases
10 with any other attorneys in my law firm?

11 A. Yes, ma'am, quite a few.

12 Q. Okay. But this was the first one that you ever worked
13 with me?

14 A. Yes, ma'am.

15 Q. Okay. With regard to, like, training certifications, can
16 you tell the jury a little bit about what your training
17 certifications may be without going into too, too much detail?

18 A. I have been trained in virtually every force modality in
19 there from empty hand -- I was a fourth-degree black belt.
20 And then at some time I was high speed. Now I have a problem
21 getting out of my own way. So I have that background. And
22 then took all of the close quarter personal control, PPCT,
23 active countermeasures, took all of those training courses and
24 wound up training -- being a train the trainer for them and
25 then literally chiefs and sheriffs, they were -- they would

not accept these other training modalities. They said, "What are you training, Sam?" And so I became, at least for the State of Ohio and surrounding states, I was the certifying entity, I will call it.

Q. Okay. And you were here in court yesterday for Dennis Root's testimony?

A. Yes, ma'am, I was.

Q. He mentioned -- I want to make sure I get it correctly -- Force Science Institute?

A. Yes, ma'am.

Q. Can you tell the jury what involvement if any you have had with Force Science Institute?

A. I have had the same course that Mr. Root's had, which is human factors performance. That's what we look at. What is -- Dr. Lewinski, Ph.D., he brings in specialists. It's an intensive course, and there are a whole series of topics, so reaction time under stress, the effect of stress on the eye, reaction time on performance, all those different things are discussed.

Q. And so what Mr. Root described yesterday is the training that he received by Force Science Institute is the same training you received?

A. Yes, ma'am.

Q. Do you receive a certification through Force Science Institute?

09:53:59 1 A. Yes, ma'am.

09:54:00 2 Q. Okay. With regard to the expert witness work, have you
09:54:07 3 testified previously in any Courts in West Virginia?

09:54:11 4 A. Oh, yes, ma'am.

09:54:12 5 Q. Okay. Have you had any reason to have a court, for
09:54:18 6 whatever reason, exclude your testimony?

09:54:21 7 A. Never for qualifications. I learned afterwards that I
09:54:26 8 can recall, in 2000, I believe that case was called *Lockman*
09:54:32 9 *vs. Perdue* (phonetic). It was in the Southern District, and
09:54:33 10 then there was another in 2003. I don't remember the cite on
09:54:38 11 that one, but the judge -- it was his decision that they were
09:54:43 12 empty hand control incidents, and he said the jury knows what
09:54:47 13 a punch is, and the jury knows what a wrestling match is. We
09:54:50 14 don't need any experts. So experts were not used in that
09:54:53 15 case. There was a case for summary judgment in 2006, I
09:55:00 16 believe it was, where a lady had come into a town meeting and
09:55:04 17 was extracted from the meeting and arrested. The judge said
09:55:10 18 that excessive force was not used, so I don't need an expert
09:55:16 19 to tell me about that, and so no experts were used in that.

09:55:21 20 And then there was one other where I don't remember the
09:55:25 21 fact pattern of it, but it was again for summary judgment, and
09:55:29 22 the judge ruled that -- he said, I would admit Mr. Faulkner's
09:55:34 23 affidavit, whatever, written opinion paper. He said, "I am
09:55:37 24 not going to rely on it." There was no excessive force, and
09:55:39 25 summary judgment was granted. Those are the only ones I know

09:55:42 1 about.

09:55:42 2 Q. Okay. Have you been qualified as an expert in use of
09:55:47 3 force by courts in West Virginia?

09:55:49 4 A. Yes, ma'am.

09:55:50 5 Q. Is there any other aspect of your training as a law
09:55:56 6 enforcement officer or with regard to train the trainer that
09:56:00 7 we have not discussed with the jury here this morning?

09:56:05 8 A. Well, I think one important factor is I did what was
09:56:09 9 called the combative firearms training.

09:56:13 10 Q. What is that?

09:56:13 11 A. It's -- you are going to do qualification where you are
09:56:17 12 shooting at a target, but in the stress of the situation, it
09:56:20 13 is very different. And it is well-known and taught around the
09:56:25 14 nation, around the world, that there are things called sensory
09:56:29 15 distortions, you lose feeling in your hands, your pupils
09:56:32 16 dilate, you lose close vision, you lose sometimes your
09:56:36 17 hearing, memory distortions, getting things backwards. I
09:56:40 18 would actually put officers through those situations.

09:56:45 19 Q. Why?

09:56:46 20 A. I always said that the street is not the place to learn
09:56:52 21 first time for anything, because that critical incident is a
09:56:56 22 life and -- an often life and death encounter. So I would put
09:57:00 23 them in these simulated training scenarios with what we call
09:57:05 24 marking ammunition that will sting you, and I would cause
09:57:09 25 these distortions. And once I started doing that, word got

09:57:14 1 out, and I was sent all over the country doing that kind of
09:57:17 2 training.

09:57:17 3 Q. Okay. So that was in addition to the train the trainer
09:57:21 4 training that you have done?

09:57:22 5 A. Yes, ma'am.

09:57:22 6 Q. Okay. Anything else about the training you have either
09:57:26 7 taken or received, or training or provided in the context of
09:57:33 8 law enforcement over the past 30 -- or more than 30 years, I
09:57:37 9 guess?

09:57:38 10 A. I don't believe so.

09:57:40 11 Q. Okay.

09:57:42 12 MS. DURST: Your Honor, at this time I would move to
09:57:43 13 have Mr. Faulkner qualified as an expert in the field of use
09:57:47 14 of force, specifically with regard to law enforcement.

09:57:50 15 THE COURT: Understood. Any voir dire or objection,
09:57:53 16 Mr. Umina?

09:57:53 17 MR. UMINA: Just like to ask him a few questions
09:57:57 18 briefly, Your Honor.

09:57:57 19 THE COURT: Understood.

09:57:58 20 CROSS-EXAMINATION

09:57:58 21 BY MR. UMINA:

09:57:59 22 Q. Mr. Faulkner, just so the jury is clear before you give
09:58:01 23 your testimony, you are not an expert on memory, are you?

09:58:03 24 A. No, sir.

09:58:03 25 Q. You are not an expert on how the brain reacts to stress,

09:58:07 1 are you?

09:58:07 2 A. No, sir.

09:58:07 3 Q. You don't consider yourself to be an expert on how the

09:58:12 4 brain tracks moving objects, correct?

09:58:15 5 A. Correct.

09:58:15 6 Q. Are you not a crime scene reconstructionist?

09:58:18 7 A. Correct.

09:58:19 8 Q. Are you not an accident reconstructionist?

09:58:21 9 A. Correct. I am not.

09:58:21 10 Q. And to be clear, your time as the chief of police, that

09:58:25 11 was a 15-hour a week job, wasn't it?

09:58:28 12 A. Absolutely not.

09:58:29 13 Q. You received a salary of \$15,000 year?

09:58:32 14 A. I did, because --

09:58:34 15 Q. Because it was a part time job?

09:58:36 16 A. Absolutely not, sir.

09:58:37 17 Q. Sir, in that command, you only had three people under

09:58:41 18 you, correct?

09:58:41 19 A. No, sir.

09:58:42 20 Q. Is that your testimony today?

09:58:45 21 A. Would you like me to answer it?

09:58:48 22 THE COURT: Is this relative to his qualifications as

09:58:50 23 an expert?

09:58:51 24 MR. UMINA: In terms of his qualifications as chief

09:58:52 25 of police, yeah. I believe that it is.

09:58:55 1 THE COURT: I am not sure his qualifications as chief
09:58:58 2 of police are relevant to his expert opinion.

09:59:01 3 MR. UMINA: No objection, Your Honor.

09:59:02 4 THE COURT: Understood. Any further questions?

09:59:04 5 MR. UMINA: No, Your Honor.

09:59:05 6 THE COURT: All right. Any objections to the motion
09:59:07 7 to qualify --

09:59:08 8 MR. UMINA: No, Your Honor.

09:59:09 9 THE COURT: -- Mr. Faulkner? Understood. Thank you,
09:59:09 10 sir. Without objection, then, Mr. Faulkner is deemed
09:59:12 11 qualified as an expert in the fields identified by Ms. Durst.

09:59:17 12 Ladies and gentlemen, like Mr. Root, Mr. Faulkner has
09:59:19 13 now been qualified as an expert witness by this Court. That
09:59:24 14 means he is permitted under the rules of evidence to share
09:59:27 15 with you opinions that non-expert witnesses normally would not
09:59:30 16 be able to do.

09:59:31 17 Ms. Durst, you may proceed.

09:59:32 18 MS. DURST: Thank you, Your Honor.

09:59:33 19 BY MS. DURST:

09:59:34 20 Q. Mr. Faulkner, one other kind of item I had forgotten to
09:59:38 21 ask you about and I wanted to go ahead and do that.

09:59:39 22 For the time that you have spent reviewing documents in
09:59:43 23 this case, formulating opinions, those kinds of things, are
09:59:46 24 you compensated for your time?

09:59:48 25 A. Yes, ma'am.

Q. How much are you compensated for your time?

A. Retainer of \$2,500 used against the first ten hours of review, and then it is 250 an hour for reviewing material, writing papers, and whatnot. Travel time would be \$100 an hour.

Q. Okay. All right. So let's just kind of start off with the jury, if you can tell the jury how you came to be involved in this case?

A. I received a phone call from you, and I do what I always do when I am called; can you give me a thumbnail of what happened, because I need to find out, first of all, is it in my area of expertise, and if it is something that I am willing to take. Because if the fact pattern isn't consistent with training, then I just -- right up front, it's better to be honest, I tell the lawyer, I cannot give a favorable opinion to this and so you probably don't want to use me.

Q. And then kind of walk the jury through then, you and I had a conversation. What happens after that? I mean, what do you do in your expert witness cases? How do you review documents? Just tell the jury a little bit about how you go about that.

A. I was asked to come up and make a site visit, so I drove up and went to the well road. And that was probably in 2019 I believe that was.

Q. Let me stop you there. When you did the site visit, had

10:01:17 1 you formulated any opinions at that point in time?

10:01:21 2 A. No, ma'am.

10:01:21 3 Q. Okay. Who was at that site visit?

10:01:23 4 A. You and I were, Deputy Forsyth was, and the sheriff was.

10:01:28 5 Q. Okay. Did you have an opportunity at that site visit to
10:01:33 6 speak with Deputy Forsyth and obtain information directly from
10:01:37 7 him that you have used in the formulation of opinions in this
10:01:41 8 case?

10:01:41 9 A. I did, ma'am.

10:01:42 10 Q. Can you tell the jury just a little bit about -- kind of
10:01:45 11 walk them through that site visit when you did that.

10:01:48 12 A. Instead of like an interview and interrogation, kind of
10:01:56 13 more modern training is what is called cognitive interview,
10:02:00 14 where you go to the site, you try to put the individual as
10:02:05 15 close as they can to remembering what happened, and then just
10:02:08 16 say, in your own words tell me what happened. And then I just
10:02:12 17 listen, and I observe.

10:02:15 18 And when he went through all the things that happened,
10:02:20 19 and then got to the point where he said, "The Jeep was coming
10:02:24 20 at me," I could see, just like in his excited utterance in the
10:02:29 21 radio transmission, the voice went up, when he simulated
10:02:34 22 drawing the firearm, head went back, he started stepping back,
10:02:37 23 the voice went high, and that just told me a lot.

10:02:40 24 Q. You actually had the opportunity to be in court to hear
10:02:44 25 Deputy Forsyth's trial testimony, as well; is that right?

10:02:46 1 A. Yes, ma'am, I did.

10:02:47 2 Q. Was there anything that you recall Deputy Forsyth telling
10:02:51 3 you when you visited the scene with him some time in 2019,
10:02:56 4 that was inconsistent with what he told the jury from the
10:03:00 5 witness stand?

10:03:00 6 A. No, ma'am.

10:03:01 7 Q. Okay. So I am sorry I stopped you. So let's continue
10:03:05 8 walking through the scene. What else did you do when you
10:03:07 9 visited the scene?

10:03:08 10 A. That was, you know, the site visit. And then you
10:03:15 11 provided me with the documents. I reviewed the documents.
10:03:20 12 And then always I am asked if there is anything else I would
10:03:24 13 need, and when I felt I had all the documents I needed, then I
10:03:27 14 wrote an opinion paper. And then afterwards, there were more
10:03:31 15 materials that happened, and I wrote a supplemental opinion
10:03:37 16 paper, and that's where we are today.

10:03:38 17 Q. So let's kind of -- let me just ask you if you -- did you
10:03:41 18 review the statements either in audio or written form or both,
10:03:46 19 that Deputy Forsyth and Deputy Love provided to, then
10:03:51 20 Sergeant, now Lieutenant Branham?

10:03:53 21 A. I did.

10:03:53 22 Q. Okay. Did you review the deposition testimony of the
10:04:00 23 witnesses that we have heard here in the courtroom today,
10:04:02 24 either Corey Love by video, Deputy Forsyth, Mr. Root,
10:04:08 25 Lieutenant Branham; did you review all those?

10:04:10 1 A. Yes, ma'am, I did.

10:04:11 2 Q. Okay. Did you review the West Virginia State Police
10:04:16 3 investigation report that was completed by Lieutenant Branham?

10:04:20 4 A. I did.

10:04:21 5 Q. Did that include photographs of the scene that he had
10:04:25 6 taken?

10:04:25 7 A. Yes, ma'am, it did.

10:04:26 8 Q. Okay. Did you also have an opportunity to review -- let
10:04:33 9 me back up again. Were you in court when we had the
10:04:37 10 opportunity to play the radio traffic from August 2nd?

10:04:41 11 A. Yes, ma'am, I was, and I had that provided.

10:04:44 12 Q. Okay. When it was provided to you, did you have any
10:04:48 13 difficulty in figuring out how the radio traffic was ordered
10:04:52 14 and figuring out if it was in reverse order, anything like
10:04:56 15 that, like Mr. Root testified to?

10:04:57 16 A. No, ma'am. It is a standard time signature on it.

10:05:00 17 Q. Was there anything else that you can think of
10:05:03 18 specifically that you reviewed to assist you in the
10:05:07 19 formulation of the opinions that you will be giving to the
10:05:09 20 jury here this morning?

10:05:11 21 A. I did review the force policy.

10:05:13 22 Q. Okay. The use of force policy?

10:05:17 23 A. Yes, ma'am. And then just the review of some of the text
10:05:21 24 work that I have in terms of the training I have received that
10:05:24 25 apply to this situation.

1 Q. Okay. You visit the site, get additional information,
2 and then take that information to formulate opinions?

3 A. Yes, ma'am.

4 Q. Okay. One thing that I had forgotten to ask you about as
5 well when we were talking about kind of, like, your education,
6 experience, background, can you tell the jury a little bit
7 about the research studies that you have done, and I guess
8 what the reasoning or rationale behind doing those research
9 studies was, and what the culmination of the studies would
10 have been?

11 A. Yes, ma'am. When a critical incident happens, or there
12 is what we call a bright-line decision comes down from the
13 Supreme Court, everything in law enforcement changes. The
14 shooting case of *Tennessee vs. Garner* changed the way law
15 enforcement firearms was training nationally. That was
16 before -- I was an officer, then, but I wasn't at the academy.
17 I was at the academy in 1987. So in 1989, the bright-line
18 case that we talk about of *Graham vs. Connor* happened. Right
19 away the Ohio Attorney General's Office contacts the Peace
20 Officer Training Commission and says, "What are you training
21 officers?" Because you have to make sure you are in line with
22 court guidelines. And that's when the information came, it's
23 objective reasonableness, and factors in the tests that were
24 actually cited correctly by Mr. Root, that was correct, and it
25 says we must act as other reasonable officers would have acted

1 in a tense, rapidly evolving situation, where the exact level
2 of force necessary is unknown, what is that? And I had what I
3 considered the luxury of training thousands of officers every
4 year in multiple states, and I would never tell an officer
5 what to do, unless I put it in context. In other words,
6 anything done at the right time is right, anything done at the
7 wrong time is wrong.

8 And so I started first on my own, and I would -- the
9 classes that would come for officers and trainers, I would say
10 if an incident happened, like where a person is pulling away
11 from an officer, if you read any police report, it is based on
12 what we call kinesiology, movement of the human body. The
13 person pulled away so I, the person slapped me so I, the
14 person tried take my gun away, so I.

15 So we take the movements of the human body and then I
16 would ask three questions, based on *Graham versus Connor*:
17 What move would you attempt to stop this action? What is the
18 greatest amount of force anybody should use to stop that
19 action? And how much of a threat? I did, on a scale of 1 to
20 10 -- do you place that action at, if that makes sense to you.
21 And they would answer. They would take a survey.

22 And back then I would do it by hand, and I would tally
23 it. And people aren't clones, but I started to see it's very
24 close. And so then I contacted the Ohio Attorney General and
25 I said -- back then it was Anthony Celebrezze -- I said, "Sir,

10:08:56 1 may I do research?" He said, "You may do research. We're not
10:09:00 2 going to fund it. We're not going to give you the time to do
10:09:02 3 it. It must be anonymous, but you are welcome to share it,"
10:09:06 4 and so I did. I bought my first computer. It was an Apple
10:09:10 5 2E, a used computer with a floppy disk, and I started
10:09:14 6 surveying officers. From their responses -- well, after --
10:09:19 7 the standard is objective reasonableness. In other words, a
10:09:23 8 bunch of cops can't get together and say, "We can do this and
10:09:26 9 we can do that." It's what you believe are reasonable
10:09:30 10 responses. So I started -- I put myself on the Ohio Attorney
10:09:36 11 General Speaker Bureau, and I went to Kiwanis clubs, Rotary
10:09:41 12 clubs, high school, college government classes. I did St.
10:09:45 13 Rita's School for the Deaf. And I would go to them and say,
10:09:48 14 ladies and gentlemen, we are going to talk about a negative
10:09:50 15 topic, the use of force by a law enforcement officer. It is
10:09:54 16 our job to protect and serve you. I am going to show you what
10:09:59 17 I am training the officers. Then I am going to ask you on a
10:10:03 18 survey, "Is this acceptable or does it offend you?"

10:10:06 19 When I first started doing that, cops said, "You can't do
10:10:08 20 that." And I said to them, "If you are sued for excessive
10:10:13 21 force, how many cops will be on your jury? I need to know
10:10:17 22 what I train you" -- and now it's not just Ohio, they sent me
10:10:20 23 all over the country -- so now I am advising multiple states'
10:10:25 24 training divisions on what to do and when. What if I was
10:10:29 25 wrong? I wouldn't just mess up Ohio, I would mess up multiple

1 states. So I needed to do this research, and continued, and
2 continue still today.

3 Q. And how many -- are you able to give the jury, like, how
4 many -- estimates of the number of participants in these
5 studies?

6 A. We are probably around 70,000, somewhere in there.

7 Q. And who are -- I mean, who are the participants in these
8 studies?

9 A. It would be -- it can be anybody. People can go online
10 and take the survey. When I go up and do training, I would do
11 the survey. Oftentimes after critical incidents. Like there
12 was a neck restraint related death in Columbus, excuse me, in
13 Cleveland, called the Pipkins incident, and there was almost
14 race riots going on at the time, so I was detailed up there
15 and spoke to the black community and said, "Ladies and
16 gentlemen, here is what I am training the officers," and I
17 surveyed them. Kokomo, Indiana had their shooting incident.
18 Same thing, town hall meeting I did that. So I went --
19 *Tennessee vs. Garner*, it occurred in Memphis, Tennessee. The
20 director of the Memphis Police Department, a top 25 police
21 department -- 2,500 officers -- asked me to survey his
22 officers particularly. Then I went down into Memphis and
23 trained their trainers, and then Director Rawlings got on
24 television, and said, "Here is what we have done. Please come
25 on the website and take the survey," and provided the survey

1 to the newspapers, television, everybody just for
2 transparency. That was in 2017.

3 2020 was a very -- there was great upheaval around the
4 nation. All right. And there were -- you could see
5 demonstrations, riots, all that kind of stuff. Director
6 Rawlings called me again and said, "Would you come resurvey
7 the community?" So in 2020, I resurveyed the Memphis
8 community, and again all that information is published to
9 everybody. It's online.

10 Q. When you survey the community, are you asking the same
11 questions to law enforcement and then asking those same
12 questions to civilians to find out what the law enforcement
13 officer thinks might be reasonable versus what the civilian
14 community thinks what might be reasonable?

15 A. Yes, ma'am. Again, the reaction, if a person is pulling
16 away way, what control measures are reasonable? Just in your
17 opinion, if a person is pushing an officer; if a person is
18 strike, punching, or kicking an officer; the person is
19 attempting to take an officer's gun away; if the subject is
20 using a weapon against an officer, those type of questions.

21 Q. And you said this research is available online?

22 A. Yes, ma'am.

23 Q. Mr. Root had testified yesterday that he was not able to
24 locate the research. Where is the research that would be
25 available?

10:13:30 1 A. Well, I took you through it last night, and it probably
10:13:35 2 took 20 seconds to get there. You go to "Response to
10:13:36 3 Resistance." I am the first one that comes up on all those --
10:13:40 4 because that is the -- some departments still call it use of
10:13:47 5 force. I don't believe that's correct. So you will see many,
10:13:50 6 many departments now around the country will call it a
10:13:54 7 response to resistance or aggression policy. That comes from
10:13:58 8 the research and the training.

10:13:59 9 Q. Okay.

10:13:59 10 A. So you click on that, it asks for your email so that they
10:14:05 11 can send you any updates or anything that I have, and you are
10:14:08 12 right on the site. And the research from Memphis is on there,
10:14:13 13 the research from Parkersburg, West Virginia, which I did the
10:14:16 14 department and the community in Parkersburg. The book is on
10:14:19 15 there. And it's just there. Downloadable. I never charge
10:14:23 16 anything. Never have.

10:14:24 17 Q. Okay. And as a result of this research that you have
10:14:29 18 done, what is, I guess, the culmination of that research?

10:14:37 19 A. It was called the action response continuum, so I made
10:14:40 20 a --

10:14:41 21 Q. Let me stop you there, Mr. Faulkner, if I might. Can we
10:14:44 22 use the projector?

10:15:16 23 MS. DURST: Your Honor, can we see if the jurors are
10:15:18 24 able to see this?

10:15:20 25 THE COURT: Absolutely. Can everyone see that okay?

1 I am seeing all affirmative head shakes. Okay. I think we
2 are good to go. You may proceed. Thank you.

3 BY MS. DURST:

4 Q. So Mr. Faulkner, I stopped you when you started to
5 describe the action response continuum. Is this what you were
6 starting to describe to the jury?

7 A. Yes, ma'am.

8 Q. Okay. Can you -- and you have a screen there in front of
9 you as well. And although I don't think it worked that well
10 yesterday, but I think you can touch the screen if you need to
11 point to something. Okay. Our clerk is telling us that I
12 think it works today. If you -- okay. If you can explain to
13 the jury what this action response continuum is, what it shows
14 individuals, how you rely upon it, just generally if you
15 would, please.

16 A. When I survey all the people, originally it was
17 open-ended questions. All right. I outlined to you; what
18 would you use; greatest amount of force anybody should use.
19 When I had I don't know how many thousands of that, I tried to
20 make a pictorial representation of the average, the mode, the
21 mean, the medium, the standard deviation, you know, of
22 people's general opinions. I am not a graphic artist. I
23 failed miserably, so I hired a professional. This is a
24 pictorial representation of what officers and the citizens
25 that we serve said -- say are acceptable responses to assault,

1 resistance, and aggression.

2 It is hard to be overly scientific about a fistfight.

3 It's usually not a push or a punch or whatnot, so normally I
4 will tell officers if the subject is acting -- actions are say
5 in the green area, they are pulling away, the officers'
6 responses should be somewhere in the bluish, greenish,
7 yellowish area of the continuum, as a response. The more
8 color codes you jump, the less people will agree with your
9 decision.

10 Q. So when you say color codes you jump, do you mean going
11 down this graph from blue to red?

12 A. Yes, ma'am. For example, if a subject were not
13 responding to your commands, that is the blue area.

14 Q. Okay.

15 A. And the officer's decision is to shoot him, nobody is
16 going to agree with that decision. The more color codes you
17 jump, the less people will agree with that decision.

18 Q. Okay. I think I see what you are saying. So the
19 individual's action would be the suspect's, so to speak, that
20 the officer is encountering?

21 A. It is always based on that. That is why I don't -- use
22 of force to me is a misnomer. You just don't use force. If
23 you do use force for no reason, you are wrong. There is an
24 action, and you respond to that action. That is what this
25 shows.

10:18:24 1 Q. Okay. So, for instance, if we looked at the green on the
10:18:28 2 left, refusing to move, dead weight, pulling away from the
10:18:32 3 officer, that would be the action of the -- I am using the
10:18:36 4 term suspect, the action of the individual the police officer
10:18:39 5 is encountering, correct?

10:18:40 6 A. Yes, ma'am.

10:18:41 7 Q. And then the -- you would expect the officer's response,
10:18:46 8 the acceptable mode of response, would be immediately across
10:18:50 9 in the green?

10:18:51 10 A. Yes, ma'am. Anything in the bluish, greenish, and could
10:18:56 11 be in the yellowish area, simply on the other officer subject
10:19:02 12 factors. In other words, when I was a hotshot martial artist,
10:19:08 13 if there was somebody 6'6 and 280, I didn't care. Now at 70
10:19:13 14 and six surgeries -- 72 actually -- and six surgeries, you
10:19:16 15 know, if somebody is 200 pounds and 6-foot, I'm like, "Can we
10:19:20 16 just talk about this?" Before I would try to use empty-hand
10:19:25 17 control, because I was very confident in what I did. Now it's
10:19:28 18 going to be (indiscernible) or something like that, to try to
10:19:30 19 not get into this hand encounter.

10:19:33 20 Q. So if -- tell me if I am understanding this action
10:19:36 21 response continuum correctly, then. If the individual's
10:19:40 22 action is in the yellow, pushing officer, wrestling with
10:19:44 23 officer, anything in yellow or above, based on the survey,
10:19:47 24 would be an acceptable response by the officer?

10:19:51 25 A. Yes, ma'am.

1 Q. Okay. And so then if we look at the yellow, pushing
2 officer, wrestling with officer, if we move down, going into
3 the red, the use of deadly force, would be, in the minds of
4 the respondents to the survey would be less acceptable?

5 A. Yes, ma'am.

6 Q. Okay. Did you -- and we will talk about your specific
7 opinions in this case -- but did you use the results of your
8 research and this action response continuum, to formulate
9 opinions in this case?

10 A. I always do. Yes, ma'am, I did.

11 Q. Okay. All right. I think I have gotten you sidetracked
12 a little bit. We were talking about what you had reviewed and
13 what you had done in this case. So after you reviewed all the
14 information that we talked about, the radio traffic, the
15 statements, your site investigation, the depositions, what is
16 the next thing that you do?

17 A. Then I would formulate opinions in a statement of
18 opinions, whatever view, statements of opinions, basis for
19 opinions.

20 Q. And did you actually formulate two opinions in this case?

21 A. I did, an original opinion. And then there was other
22 information made available, and then made a supplemental.

23 Q. You will be testifying here today to the jury with regard
24 to two particular opinions; is that right?

25 A. Yes, ma'am.

1 Q. Okay. Mr. Faulkner, opinion number one, I just want to
2 go ahead and start walking you through your opinions if I
3 might. "Deputy Forsyth did his duty and placed himself in
4 harm's way when he responded to a high risk pursuit." Is that
5 an opinion that you have in this case?

6 A. Yes, ma'am, it is.

7 Q. Okay. And you heard Mr. Root's testimony yesterday with
8 regard to the fact that he didn't believe that Deputy Forsyth
9 and Deputy Love were involved in a pursuit because they had
10 lost site of Mr. Rhoades. You heard that testimony?

11 A. I did.

12 Q. Can you tell the jury, do you agree or disagree with
13 that?

14 A. I disagree. But to me, it's a minor point. You can call
15 it anything you want. If you have been to Florida, it's very
16 different then West Virginia. It's flat, and you will go for
17 hours and never turn a wheel. Going from where I used to live
18 in Okeechobee to the airport, I would kid with my wife, there
19 is turn after like an hour and a half, you would have to turn
20 the wheel, like, two degrees, and it's like, "Oh, my God, a
21 curve, what do I do?"

22 If someone is out of sight in Florida, they are way away,
23 then you may have to search for them. In West Virginia, you
24 go around a turn or a switchback, and they can be ten feet
25 away from you, and you can't see them.

1 Q. Okay. So with regard to Mr. Root's opinion that they
2 were not actively involved in a pursuit, they were searching
3 for him, does that information impact your opinion at all that
4 Deputy Forsyth did his duty and placed himself in harm's way
5 when he responded to a high risk pursuit?

6 A. No, ma'am.

7 Q. Okay. Can you tell the jury why you have formulated this
8 opinion, and how you came to reach that opinion.

9 A. Yes, ma'am. Pursuits, I believe everybody knows, you can
10 see them on television, they are dangerous. And that's why
11 they are highly regulated. Like in law enforcement now, there
12 are two cars on the pursuit. Everyone else takes parallel
13 paths. It's not like it used to be, a Gumball Rally where you
14 had 37 cop cars behind somebody. You don't do that now. We
15 have a primary, a secondary unit following. You have people
16 traveling on different roads to see where they could possibly
17 cut off. You've got a supervisor on the line, that if they
18 feel it's dangerous, they tell you to terminate the pursuit.
19 It's just knowing that a pursuit is just naturally high risk
20 to everybody; the driver of the vehicle, officers following,
21 and the general public.

22 And my point is, officer -- Deputy Forsyth, Deputy Love,
23 knew this was a pursuit. They did their duty. They went
24 right to that area. They followed that vehicle. They saw the
25 vehicle swerve almost hitting a car, which, again, just

1 increases, to me, the risk. It tells you something about --
2 the driver certainly wanted to get away. And that's all that
3 meant, that they were doing their duty in a high risk
4 situation.

5 Q. You heard Mr. Root talk about Deputy Forsyth -- I'm
6 trying to remember the word he used -- not taking a step, or
7 jumping out of the way. Do you recall that testimony from
8 Mr. Root yesterday?

9 A. Yes, ma'am.

10 Q. Do you have -- do you agree or disagree with that
11 statement?

12 A. I disagree.

13 Q. Why?

14 A. If I could, I think it would be easier for the jury to
15 understand if I put in it order.

16 Q. Okay.

17 A. If that is okay?

18 Q. Absolutely.

19 A. From everything I reviewed, and sitting through the
20 testimony here, here is what I believe we know. You are going
21 to decide whether I am right or not.

22 We know that Mr. Rhoades did not stop when he was
23 signaled to do so. We know that he almost struck a vehicle.
24 We know that -- we heard from the radio transmission and
25 testimony, the deputies were informed that Mr. Rhoades may be

armed. We heard that radio transmission. We know that Mr. Rhoades' Jeep went down a well road, was the first to go down that road. We know following him was Deputy Forsyth and Deputy Love's cruiser. They were second down the road. We know that the time and distance transmission. In other words, at some point of traveling down that road, we know Deputy Forsyth told dispatch of his travel and location. We know from that transmission to the shots fired transmission, that everybody heard, was approximately 16 seconds. We know there were a number of vehicles that went down that road, well road, after the incident. We had Deputy Love and his testimony, talking about the Mannington officer, who he knew was a relation to Wesley Wheeler. And then the Mannington chief, so we have got two more cruisers that very possibly went down that road. We know we had an ambulance go down that road, or a squad. We know from the pictures taken later on there was a Jeep, and the cruiser, so those vehicles had to go out of that well road, because we learned after the fact, that was the only way in and only way out. We know the final resting place of the Jeep. We know the final resting place of the cruiser. We know that Mr. Rhoades was removed from the Jeep, and somebody closed the door. The pictures shows that. We know that the Jeep was in neutral and running. We know that Deputy Forsyth fired seven rounds. And he said he did that because he was afraid he wouldn't see his wife and

1 children again. We know Deputy Love did not fire his service
2 weapon, but we know that he said, I was afraid that my partner
3 was going to be killed or was killed. We know there was
4 damage to the front end of the Jeep from being struck by
5 rounds. We know that there was seven rounds fired, and one of
6 the rounds impacted Mr. Rhoades, and he did die as a result of
7 being struck by that round. Everything else is speculation.

8 Q. And what you mean, everything else is speculation?

9 A. It's unknown and cannot be known because just as in
10 *Graham versus Connor*, this was a dynamic, moving situation.

11 Q. Okay. With regard to the opinion that Deputy Forsyth did
12 his duty and placed himself in harm's way, when he responded
13 to the high risk pursuit of Mr. Rhoades, is there any other
14 information factually that you have heard in the courtroom
15 throughout the course of this trial that has altered that
16 opinion?

17 A. No, ma'am.

18 Q. Okay. And why is it that you believe Deputy Forsyth
19 fulfilled that duty and placed himself in harm's way?

20 A. We know that he did pursue. We know from the testimony
21 that he perceived that Mr. Rhoades swerved in traffic almost
22 hitting another car, and we all heard the radio transmission
23 that the subject may be armed.

24 Q. Is it fair to say, Mr. Faulkner, that you have some
25 disagreement with some other opinions that Mr. Root offered in

10:29:20 1 court yesterday?

10:29:20 2 A. Yes, ma'am, I do.

10:29:21 3 Q. Okay. Are you able to talk about that after you address
10:29:26 4 your second opinion?

10:29:27 5 A. I think probably best in that opinion if we can -- I
10:29:31 6 think just for the ease if we can start right from the entry
10:29:35 7 of the well road, and we will just try to take it step-by-step
10:29:39 8 of what happened.

10:29:39 9 Q. Okay. Well, let's talk about your second opinion that
10:29:44 10 Deputy Forsyth's response to Mr. Rhoades placing members of
10:29:47 11 the general public at risk of death or serious bodily harm
10:29:51 12 after attempting to run over the deputy complied with Supreme
10:29:55 13 Court guidelines -- excuse me -- and national law enforcement
10:29:58 14 operational practices; is that your opinion?

10:30:00 15 A. Yes, ma'am.

10:30:01 16 Q. Okay. And did you formulate that opinion after doing all
10:30:06 17 of the things that you have told the jury that you did?

10:30:08 18 A. Yes, ma'am, I did.

10:30:09 19 Q. Okay. You have had the opportunity to sit through the
10:30:14 20 trial and hear all of the testimony that the jury has heard
10:30:18 21 this week so far, right?

10:30:19 22 A. Yes, ma'am.

10:30:19 23 Q. Has there been anything that you have heard that has
10:30:23 24 changed that opinion?

10:30:25 25 A. No, ma'am.

1 Q. Okay. Okay. So let's go ahead, then, take it as we are
2 going down, starting down the, I guess, the access road to the
3 gas well site.

4 A. Yes, ma'am. We all saw the pictures. There has been
5 some debate on whether it was five feet nine inches or six
6 feet nine inches or eight feet. It depends on what you
7 measured. Is it the difference between the trees? But I
8 think everyone will stipulate the fact that the Jeep did make
9 it down that road, and the cruiser did make it down the road,
10 and the ambulance made it down the road. So I really don't
11 care what the distance of the roadway is. We know that it was
12 approximately, I believe they said, about 213 feet. And then
13 there were some from his visit four years after the event.

14 Q. Let me stop you there. Whose visit?

15 A. Mr. Root's.

16 Q. Thank you.

17 A. Site visit, four years after the event, the day before
18 trial when he measured that, he came up with a time and
19 distance. That just had me moving all over my seat, because
20 he has had the same training I have had. His equations were
21 fine.

22 Q. Let me stop there. With regard to the actual numbers
23 that he had in that chart, if you are traveling, you know, ten
24 miles an hour -- do you have any disagreement with the actual
25 calculations that he had in the time and distance chart?

1 A. No, ma'am. He went to the same speed and distance
2 calculator and computer that I did to do the same
3 computations.

4 Q. I stopped you, so where is the disagreement? With regard
5 to the application of those measurements to the facts of this
6 case?

7 A. Yes, ma'am. And the reason is, you don't know where the
8 cruiser was when that transmission was put out.

9 Q. Which transmission?

10 A. The transmission of when he turned down the well site,
11 because Deputy Forsyth had to operate that vehicle. He
12 said -- the testimony was he almost went by, then he came
13 back, and then went down the well road. You have to be
14 manipulating your vehicle to do that. So some time down the
15 well road he did what he needed to do and informed dispatch of
16 the direction of travel. We don't know where on the well road
17 that is. You can come up with five miles an hour, ten miles
18 an hour, 15 miles an hour, you don't know, no one knows, the
19 speed of that vehicle. And you can speculate maybe 25. It
20 was a cruiser. It's not his personal vehicle where I
21 guarantee I can go down that well road going 50 miles an hour.
22 I don't care. It's a cruiser. But I don't know the speed.
23 Nobody knows the speed. So to put the time and distance
24 calculator, it's just guessing, and you might as well put up
25 on there, the title chart, and the celestial chart, and where

1 the sun is, and the pollen count. It's a useless-meaning time
2 and distance calculation in there.

3 Q. Mr. Root portrayed that as, what I at least took as
4 somewhat of a scientific calculation. Do you believe that
5 there was any scientific calculation in what he did, applying
6 the time and distance measurements to the facts of this case?

7 A. It was a scientific calculation on a total guess.
8 University MSU, making stuff up. It could have been this. It
9 could have been that. Nobody knows, and everybody is
10 testifying here when they have been asked that final question
11 well, no. Nobody knows, and can't know.

12 Q. Okay. So with regard to starting down the access road,
13 we know at some point as Deputy Forsyth is going down the
14 access road, he radios at the transmission that we saw?

15 A. Yes, ma'am.

16 Q. Which I can't remember the exact time. I think it was
17 2:43 and 4 seconds.

18 A. I don't recall, yeah.

19 Q. So then as we continue to travel down that access road,
20 we have the, I guess, the photograph of the muddy tire track?

21 A. Yes, ma'am.

22 Q. Okay. You heard Mr. Root's testimony about that, right?

23 A. Yes, ma'am.

24 Q. Do you place any emphasis at all on that photograph in
25 the formulation of your opinions in this case?

10:35:14 1 A. None at all.

10:35:16 2 Q. Why?

10:35:16 3 A. We had a Jeep go there. We had a cruiser go there. We
10:35:22 4 had as many as two other cruisers. I don't know whether --
10:35:26 5 nobody knows, because nobody asked did Lieutenant Branham
10:35:32 6 drive down there to see the scene and then turn around and
10:35:35 7 back out, either back out or turn around to put his cruiser
10:35:39 8 where you saw in the picture? I don't know. I know the
10:35:42 9 ambulance went down that access road. And after the fact,
10:35:46 10 since that is the only way in or out, the ambulance came back
10:35:49 11 out of that road. What are you going to infer from a muddy
10:35:53 12 tire print of what that had to do with anything?

10:35:57 13 Q. So safe to say that that did not factor into your
10:36:00 14 analysis in this case at all?

10:36:02 15 A. The only thing that you can say about that is there was
10:36:05 16 vehicle traffic down that well road.

10:36:08 17 Q. So we continue -- let's continue traveling down that
10:36:11 18 access road. So we have gotten to the access road, we have
10:36:14 19 gotten past the muddy tire print, and we come to what has been
10:36:19 20 described, at least by Mr. Root, as the opening to the bowl?

10:36:22 21 A. Yes, ma'am.

10:36:23 22 Q. Okay. So can you tell the jury what information you are
10:36:30 23 able to ascertain from approaching and arriving at the opening
10:36:35 24 of the bowl?

10:36:35 25 A. The truth is, almost none.

10:36:39 1 Q. What do you mean?

10:36:40 2 A. All we have -- from the videos that you saw.

10:36:45 3 Q. You mean the photos?

10:36:46 4 A. The photos that you saw, as you travel down the well
10:36:51 5 road, there was a period of time you could not see the Jeep.
10:36:55 6 When you saw the Jeep, finally, you were near the bowl
10:36:58 7 entrance, and the only thing you saw there was the final
10:37:02 8 resting place of the Jeep.

10:37:04 9 We have Deputy Forsyth and Deputy Love say it was
10:37:09 10 somewhere to the left as they went into the bowl. Where?
10:37:16 11 Nobody knows. So you don't know. No one knows when Deputy
10:37:22 12 Forsyth and Deputy Love would have first laid eyes on that
10:37:29 13 Jeep. The final resting place does not tell you that.

10:37:33 14 Q. Let me ask you, Mr. Faulkner, as you would be traveling
10:37:37 15 down that road pursuing a Jeep that you believe to be in high
10:37:46 16 risk pursuit and an individual that may be armed, would you be
10:37:49 17 focusing on how fast your cruiser is traveling down the road?

10:37:53 18 A. That would be -- would not even enter your consciousness.
10:37:59 19 Doesn't matter.

10:37:59 20 Q. Would you be focusing on the placement of the vehicle
10:38:04 21 specifically as you entered the mouth of the bowl?

10:38:08 22 A. You don't know where the Jeep is. And to explain that
10:38:14 23 timing, Mr. Root did talk about human reaction time. And that
10:38:20 24 is covered in detail, goes over very much detail in the force
10:38:27 25 science class.

10:38:28 1 Q. Which is the certification that you have, the same that
10:38:31 2 Mr. Root has?

10:38:32 3 A. Yes, ma'am.

10:38:32 4 Q. Okay.

10:38:34 5 A. Now, you are traveling down the road at some speed, and
10:38:39 6 just like Mr. Root said, it takes time to do anything. So at
10:38:44 7 some point that no one knows, the Jeep became visible to
10:38:50 8 Deputy Forsyth, who is driving the cruiser. If the cruiser,
10:38:56 9 and again we don't know, so I am just tossing this out to you,
10:39:00 10 if the cruiser was traveling ten miles an hour, in one second
10:39:03 11 it was traveling 14.67 feet. If it was 15 miles an hour in
10:39:08 12 one second, it is 22 feet. If it was 20 miles an hour, it's
10:39:14 13 29.33 feet per second, and if it's 25 miles an hour, it's
10:39:21 14 36.67 feet per second. Time isn't calculated. We don't know
10:39:25 15 which one of those it is. But we do know from Marc Green,
10:39:29 16 Ph.D., Forensic Vision, third edition, which is a text used,
10:39:34 17 referenced in Force Science Institute class. Expected
10:39:38 18 reaction time, in other words, for a driver, if I am driving
10:39:42 19 and I see a stop sign up in front of me, the time expected --
10:39:47 20 reaction time I expect it to happen. For you to get off the
10:39:51 21 gas and apply the break, it is reaction time of 0.70 seconds
10:39:58 22 to 0.75 seconds. It takes time to do everything for a human
10:40:03 23 being. Unexpected reaction time, in other words, that deer
10:40:08 24 jumped out in front of you, or somebody cuts you off,
10:40:11 25 unexpected reaction time is 1.2 seconds to 1.35 seconds.

1 Now, when you apply that to a driver or a vehicle, the
2 American Association of State Highway and Transportation
3 Official, norm of 2.5 seconds break reaction time is a
4 reasonable guess for the time achievable from 90 percent to
5 95 percent of the general population. So the general
6 population to see an event, in a surprise situation, get off
7 of the gas, on to the break, it is going to be about
8 2.5 seconds. Pick any speed you want for that vehicle, and at
9 ten miles an hour, it's 14.6 seconds times two point -- two
10 and a half. If it's 25 miles an hour, it's 36.6 seconds times
11 two and a half. We are not even going to talk about the brake
12 coefficient, which means if you stop a car quickly, you are
13 still going to slide. There is forward momentum. No one
14 knows any of that stuff. But to go on whiteboard and say I
15 need to stop right here and then speak to you about human
16 reaction time, he knew better than that. That was part of the
17 training. That was a total mischaracterization of what could
18 have been humanly possible in that situation.

19 Q. So let's talk about, then, when Deputy Forsyth gets to
20 the mouth of the bowl. As an officer approaching that, do you
21 know what's in there before you get into the mouth of the
22 bowl?

23 A. It's something no one else asked. I asked directly.
24 Four years after the incident, the day before trial, Mr. Root
25 goes in there, and then comes back and starts drawing diagrams

1 of a bowl. That was the first time Deputy Forsyth ever went
2 down that well road, so to talk about a hill up here or cut
3 down there. And then he opines how the Jeep couldn't of made
4 it; if you watch a television commercial you watch Jeeps going
5 up mountains, you see them going on stairways in China. How
6 do you know what a Jeep could do? And even if it couldn't
7 have made it up, how do you know where the well road goes?
8 Did it stop there? Did it continue on? Did it filter out
9 someplace else? You don't know. Deputy Forsyth didn't know.

10 So going on four years after the event and draw this bowl
11 like he should have known to stop here is contrary to any
12 training that Mr. Root had.

13 Q. Well, because he -- you said that Mr. Root got his
14 discussion of *Graham versus Connor* correct.

15 A. He did.

16 Q. And *Graham versus Connor* says you look at it from the
17 perspective of the reasonable officer, not with 20/20
18 hindsight?

19 A. Exactly.

20 Q. So as we go into -- we are at the entrance to this bowl,
21 what information were you able to ascertain based on what
22 Mr. Root has described as the physical evidence?

23 A. Actually very little from physical evidence, because it
24 is totally unreliable, other than the final resting place of
25 the Jeep, and the final resting place of the cruiser. We know

1 that at some point in there Deputy Forsyth made it through --
2 what Mr. Root was trying to say -- it's called a PEDDA process;
3 perceive, evaluate, decide and act. The human body must go
4 through those stages. In the military, when they are training
5 the fighter pilots, they call it the OODA -- fighter pilots
6 use that training -- observe, orient, decide and act. Every
7 human being must go through four stages of reaction time. So
8 at traveling some unknown speed, Deputy Forsyth made it
9 through that OODA loop, and tried to stop his cruiser and put
10 it in park. He admitted he made a slip. Mr. Root admitted he
11 made a slip. I would readily admit to you I made many slips.
12 I stopped at a domestic, got out of the car, and my Sergeant
13 rolled my hand up in the window. Stuff happens. And
14 afterwards, nobody is hurt, then it's something we can laugh
15 at.

16 In here, he didn't put the cruiser in park because of
17 what he felt was immediate threat to his left.

18 Q. With regard to Deputy Love's actions, Mr. Root had
19 basically talked about that it was poor practice with
20 Deputy Love going around the front of the cruiser. Do you
21 have an opinion on that?

22 A. I do.

23 Q. What is that?

24 A. I find that offensive.

25 Q. Why?

1 A. We have Deputy Forsyth bail out of the car. We know he
2 is confronting a threat. We have his partner get out of the
3 car. And he said, "I thought my partner was killed or going
4 to be killed." I would expect any reasonable officer to get
5 around any obstacle they have to, to back their partner. And
6 to say that was stupid. I find that offensive.

7 Q. Okay. So one of the questions that I asked you, and I
8 think you said it would kind of be easier to go down the
9 access road, so we are down the access road, Deputy Forsyth
10 has gotten out of his cruiser. Do you have any issue with him
11 actually exiting the cruiser?

12 A. No, ma'am, I don't.

13 Q. Why not?

14 A. When Mr. Root was first talking about it, where the car
15 should have stopped, even though it's not humanly possible
16 where it should have stopped, and should have stayed in the --
17 in the cruiser, or even into the bowl, the standard in
18 training, I will guarantee you around the United States, is no
19 one's feet hit the ground before yours.

20 Q. And what you do mean by that? Meaning the person that
21 you are pursuing?

22 A. Exactly. I mean, I have not been in a cruiser since 2009
23 probably. Still when I put my pickup truck, when I am backing
24 into a space, my seatbelt is always undone. It's just habit.
25 I just can't stop a vehicle with my seatbelt on. Law

1 enforcement is trained to do that. All right. It's a term,
2 and I don't mean to give you an offensive term. It's what we
3 use to make law enforcement aware of how severe these things
4 can be.

5 For example, if I was training you as officers, I would
6 not call that a door. That is a "fatal funnel."

7 Q. A fatal what?

8 A. A fatal funnel. That is term you use -- in other words,
9 there could be a subject hiding anywhere in this room armed.
10 They know how you are coming in. You have no idea where they
11 are. So if you see any cop shows, people get through doors
12 quickly, and then, you know, they button up through the doors
13 and whatnot because that is fatal, fatal funneling.

14 Q. So even though we as civilians would call it a door, law
15 enforcement officers call it something else?

16 A. Fatal funnel in training, yes, ma'am.

17 Q. So with regard to a vehicle then?

18 A. I call it a cruiser --

19 Q. For your cruiser?

20 A. When we do traffic, you know, we call vehicles and
21 cruisers, and whatnot, in training, if you are confronting an
22 armed subject, a potentially armed subject, depending on who
23 is doing the training, it is called a "kill box" or a "rolling
24 coffin."

25 Q. Why?

10:48:25 1 A. Because rounds shot into a vehicle, even if they don't
10:48:30 2 hit you, you have shards of glass, you have parts inside the
10:48:37 3 vehicle, you have potential ricochets, if your seat belt is on
10:48:41 4 you cannot get to your firearm, you have very limited evasive
10:48:45 5 motion. So the standard is, if you are confronting a -- armed
10:48:50 6 potentially armed subject, get out of that car, and like
10:48:54 7 Deputy Forsyth tried to do, get to the rear of the car, get
10:48:57 8 behind the tires, get behind the block, because that will stop
10:49:02 9 some rounds anyway. He tried. Unfortunately the car kept on
10:49:07 10 going.

10:49:07 11 Q. So with regard to Deputy Forsyth's actions actually
10:49:12 12 exiting the cruiser, when he got into the mouth of the bowl,
10:49:18 13 do you have any issue with that?

10:49:20 14 A. Not at all. That is exactly what officers are trained to
10:49:24 15 do, and had he not done that, that would have been contrary to
10:49:27 16 training.

10:49:27 17 Q. Okay. All right. So we have kind of talked about that.
10:49:31 18 Deputy Forsyth is out of the cruiser now. And based on his
10:49:37 19 testimony that he observed the Jeep -- let me back up. He
10:49:46 20 testified that the Jeep almost hit the cruiser as he pulled in
10:49:51 21 initially?

10:49:51 22 A. Yes, ma'am.

10:49:52 23 Q. Okay. Would that information that the cruiser -- the
10:49:58 24 Jeep almost hit the cruiser, do you still have any issue with
10:50:00 25 him exiting the vehicle?

10:50:02 1 A. No, ma'am. I don't.

10:50:03 2 Q. So he exits the cruiser, and then sees the Jeep starting
10:50:11 3 to move towards him?

10:50:13 4 A. In what he said was an aggressive manner, yes.

10:50:15 5 Q. Okay. So Mr. Root testified that Deputy Forsyth didn't
10:50:27 6 take -- didn't step out of the way of the Jeep.

10:50:29 7 A. Correct.

10:50:30 8 Q. Okay. And I took that obviously to be a criticism of
10:50:36 9 Deputy Forsyth's action. Do you have any such criticism of
10:50:40 10 his actions?

10:50:41 11 A. I don't.

10:50:42 12 Q. Why?

10:50:42 13 A. Where are you going to go? We have no idea how fast the
10:50:47 14 Jeep was going. Was it humanly possible to get out of the way
10:50:50 15 of the Jeep, because all you have to do is turn the wheel to
10:50:53 16 steer the thing? Did he have time to do that when it was
10:50:56 17 coming? Did he know where his partner was? Because Deputy
10:51:02 18 Forsyth thought Deputy Love was behind him, so I get out of
10:51:05 19 the way, "There you go partner. You catch the vehicle."
10:51:09 20 Again, that to me -- the analysis there makes no sense,
10:51:14 21 because you don't know any of these factors. But we do know
10:51:20 22 that by what Mr. Root said correctly in *Graham v. Connor*, it's
10:51:24 23 the perception of the officer in a tense and rapidly evolving
10:51:28 24 situation. And you are going to decide whether those -- that
10:51:31 25 perception that you heard him say, "I thought I wasn't going

1 to go home to my wife and kids," was reasonable or not.

2 Q. Based on the information that you evaluated before you
3 formulated your opinions, any information you evaluated after
4 the formulation of those opinions and before trial, and any
5 information that you have heard in the courtroom during trial
6 this week, has there been any of that information that has
7 caused you to believe that Deputy Forsyth's actions did not
8 comply with, as you said, Supreme Court Guidelines and
9 National Law Enforcement Operational Practices?

10 A. No, ma'am; not at all.

11 Q. Can you explain to the jury, then -- and maybe we kind of
12 walked through that a little bit with the discussion of
13 Mr. Root's opinions -- but can you explain specifically to the
14 jury how you came to formulate that opinion and why you
15 believe Deputy Forsyth's actions on August 2nd complied with
16 the Supreme Court Guidelines, which would include *Graham v.*
17 *Connor*, right?

18 A. Yes, ma'am.

19 Q. And National Law Enforcement Operational Practices?

20 A. Yes, ma'am. If there is one factor that I can speak of?

21 Q. Absolutely.

22 A. One other factor. Numerous people in here have tried to
23 make some kind of analysis of ground disturbance. And I don't
24 mind them trying to do that, but it is actually another thing
25 that is meaningless.

10:52:59 1 Q. Why is it meaningless?

10:53:01 2 A. Which vehicle disturbed the ground and when? Again, the
10:53:05 3 only thing you have to go by is a final resting place of the
10:53:10 4 Jeep and the final resting place of the cruiser. So did the
10:53:13 5 Jeep make that mark? And they are trying to talk about, kind
10:53:17 6 of see a line here. I don't care whether you see a line or
10:53:20 7 not. Who made the line? At what point did that line get
10:53:23 8 made? If you have an ambulance -- and I am pretty sure that
10:53:26 9 the responding officers and the ambulance did not back down
10:53:32 10 that access road. I don't know, but I think that's a
10:53:36 11 reasonable assumption, and you can -- if you think that is
10:53:39 12 reasonable, that's up to you. Which means if I have got a
10:53:42 13 couple of cruisers, maybe the state police, I don't know, and
10:53:47 14 an ambulance, it meant in a 33 by 45, whatever Mr. Root made
10:53:53 15 some kind of measurement, they had to turn around to get out
10:53:56 16 of there. They had to avoid what we saw in the pictures, that
10:54:01 17 there was some piping in there, the two different -- had to
10:54:04 18 avoid that when they backed out. How are you going to know
10:54:08 19 who made what lines, and when the disturbance was made? So
10:54:13 20 that also. I don't see any point to put weight on that. I
10:54:21 21 think it's contrary to the training that we have had.

10:54:22 22 Q. Okay. You wanted to discuss the actions. Then what I
10:54:27 23 had asked you was what information or how did you come to the
10:54:33 24 conclusion that Deputy Forsyth's actions on August 2, of 2017,
10:54:40 25 complied with the Supreme Court guidelines in the National Law

1 Enforcement Operational Standards?

2 A. I relied on the deposition and trial testimony of the
3 actions of the Jeep, and Mr. Rhoades driving during the
4 pursuit. I relied on the radio transmission. I relied --
5 Mr. Root was critical of me relying on the statements and
6 trial testimony and deposition testimony, of the officers, yet
7 that's what *Graham vs. Connor* tells us to do, to rely on. I
8 didn't find anything inconsistent with the scene that was
9 there of what -- the minor things that could be developed from
10 that scene. And Lieutenant Branham, who -- the state police
11 they do more than a couple accidents. He knows how to analyze
12 an accident scene like that. Again, there was nothing to
13 analyze with all of the traffic down there, and the unknown
14 movements, so that is what I relied on when I made my
15 opinions.

16 Q. And was there anything that you heard during any of the
17 testimony, whether from Deputy Forsyth, any of the other
18 witnesses, or Mr. Root yesterday, that changed that opinion?

19 A. No, ma'am.

20 Q. Let me ask this: Your opinion talks about compliance
21 with Supreme Court guidelines and National Law Enforcement
22 Operational Practices. Mr. Root framed his opinion in the
23 form of that he believed Deputy Forsyth's use of force was
24 objectively unreasonable. Do you disagree with that
25 statement?

1 A. I disagree with his statement, that it was objectively
2 unreasonable, and I disagree with the way he stated it.

3 Q. Why?

4 A. I have been in so many cases and just like there are
5 certain things we can talk about and certain things we can't.
6 I have been told repeatedly that is for you to decide. That
7 is what objective reasonableness is. It's not for me to
8 decide. I can tell you what training is. I can tell you what
9 operational practice is, but you are going to decide what is
10 objectively reasonable or not. I would not make that
11 statement.

12 Q. Let me ask you this: Mr. Root had also testified with
13 regard to Deputy Forsyth and Deputy Love exchanging copies of
14 their written statements, you know, after they gave their
15 statement on August 4 of 2017. Do you recall that testimony?

16 A. I do.

17 Q. Do you have any issue with Deputy Forsyth and Deputy Love
18 exchanging statements after the fact?

19 A. None at all.

20 Q. Why not?

21 A. The operation procedure that was done is exactly what
22 International Association of Chiefs of Police advise.
23 Separate the individuals. Take the firearms for evidence.
24 Oftentimes it's even all of their clothing, sometimes. And
25 then you separate them. You get them medically evaluated.

1 And part of it is a blood draw, and someone is going to allege
2 that there was some intoxicating substance in their body. So
3 it's all preemptive stuff that has happened from different
4 court cases. So we are advised -- you know, officers are
5 advised to do certain things. You separate them. You don't
6 have them talk to each other until statements are given.
7 After that, I have no problem if there is a video. Review the
8 video. You should. Because you can only testify -- again,
9 part of force training -- an officer will testify to what they
10 saw, and you can only remember what you saw. So in other
11 words, if I see a vehicle coming at me and I am getting out of
12 my driver's side, I can see in my peripheral vision the door
13 handle. So I can keep an eye on this vehicle. If I am on the
14 other side, the passenger's side, I have got to turn my head.
15 I have got to turn my body to get out of the vehicle. Try
16 doing that while you are looking over your shoulder. I've
17 then got to maneuver around the door frame. I've got to
18 maneuver, "Oh, my God, the vehicle is moving." I have to
19 maneuver around that, while all that attention is over here.
20 If the statements are identical, I am more concerned about
21 that, if that makes sense to you. You can only testify to
22 what you saw. And that is what I believe happened in this
23 situation.

24 Q. Do you agree with Mr. Root's testimony that an individual
25 such as Deputy Forsyth and Deputy Love being involved in a

1 stress-inducing event like a shooting can affect an
2 individual's ability to recall or even remember some events
3 forever?

4 A. Absolutely.

5 Q. You also heard Mr. Root's testimony with regard to the
6 timing, aside from Deputy Forsyth and Deputy Love exchanging
7 the statements, but the timing of when they gave the
8 statements. Do you agree with that testimony that there was
9 no issue with them not giving a statement to Lieutenant
10 Branham the day of the incident?

11 A. I have no disagreement with that at all. They did say it
12 correctly. He cited the literature in terms of Force Science;
13 talks about sleep cycles and memory. That was correctly
14 cited.

15 Q. Okay. There was some discussion as well with regard
16 Lieutenant Branham's investigation. From your evaluation of
17 this incident, was there anything you believe that Lieutenant
18 Branham could have done to get a more definitive or more
19 definitive information with regard to the positions of the
20 vehicles before the shooting occurred?

21 A. No, ma'am. Only thing you have is the reference point,
22 the final resting place of the Jeep, and the final resting
23 place of the cruiser. That is the only thing you got.

24 MS. DURST: Your Honor, may I have one moment,
25 please?

11:01:03 1 THE COURT: You may.

11:01:17 2 BY MS. DURST:

11:01:17 3 Q. Mr. Faulkner, I just wanted to clarify, when you were
11:01:21 4 talking about the radio transmission with regard to Deputy
11:01:24 5 Forsyth, saying that he was starting down the access road, do
11:01:28 6 you recall the actual transmission being that he thought that
11:01:30 7 Mr. Rhoades had cut off a trail, that it wasn't with regard to
11:01:35 8 the access road initially?

11:01:36 9 A. The well road, that is what I interpreted that as.

11:01:39 10 Q. Okay. Okay. Mr. Faulkner, the opinions that you have
11:01:51 11 given to the jury here this morning, do you hold all those
11:01:55 12 opinions to a reasonable degree of certainty in your field of
11:01:59 13 expertise and specifically with regard to the use of force?

11:02:02 14 A. Yes, ma'am, I do.

11:02:03 15 Q. Is there anything that you have heard in the course of
11:02:07 16 your testimony -- or excuse me -- in the course of observing
11:02:11 17 the testimony here during the trial, that has altered or
11:02:15 18 changed those opinions in any manner whatsoever?

11:02:19 19 A. No, ma'am.

11:02:19 20 Q. Okay. And do you believe that Deputy Forsyth's actions
11:02:24 21 on August 2, of 2017, were consistent with the Supreme Court
11:02:31 22 guidelines and the National Law Enforcement Operational
11:02:34 23 Policies?

11:02:35 24 A. Yes, ma'am, I do.

11:02:37 25 MS. DURST: Your Honor, at this point I don't have

11:02:38 1 any further questions for Mr. Faulkner.

11:02:41 2 THE COURT: Thank you very much, Ms. Durst.

11:02:44 3 Mr. Umina, I was going to give the jury their morning
11:02:45 4 break before you begin your cross if that's --

11:02:50 5 MR. UMINA: Fine.

11:02:51 6 THE COURT: Ladies and gentlemen, we have reached a
11:02:52 7 good point to take our morning break. We will do that now and
11:02:55 8 give you 15 minutes to stretch, and you can otherwise catch
11:02:59 9 your breath. We will see you back here, let's say at 11:20,
11:03:03 10 since it's almost five after at this point.

11:03:06 11 My instructions, again, remain the same. Please don't
11:03:08 12 talk about the case amongst yourselves, no independent
11:03:12 13 investigation yourselves, please. We will see you in
11:03:16 14 15 minutes. Thank you.

11:03:17 15 (Jury left the courtroom, and the following transpired in
11:03:19 16 open court.)

11:03:22 17 THE COURT: Thank you all. Please be seated. I was
11:03:36 18 just going to give Mr. Faulkner the usual instruction.

11:03:40 19 Mr. Faulkner, we are going to cover for your counsel, but
11:03:44 20 -- no one can talk to you, sir, so I don't want you to think
11:03:47 21 that anyone is being rude. You are a man without a country
11:03:52 22 until we resume, but we will take a 15-minute break at which
11:03:56 23 point, I will ask you to resume the witness stand.

11:03:58 24 Thank you all very much. We will stand in recess.

11:28:19 25 (Recess taken at this time 11:03 - 11:28.)

1 THE COURT: I have a hard copy of the charge; when we
2 go to talk about it, we will have a hard copy with line
3 numbers on it to keep us a little more together as to where we
4 are. I am sure Ms. Mannan told you the substantive
5 instructions start on page 10 through 19, as my general
6 charge, but always willing to take comments and suggestions on
7 how to improve the Court's general charge.

8 Mr. Umina, how long do you think you will be with Mr.
9 Faulkner.

10 MR. UMINA: Thirty minutes.

11 THE COURT: What we might do, and again whatever we
12 do we will play it by ear, is when we dismiss the jury for
13 lunch we will give you guys a few minutes and we will do our
14 charge conference then and go from there. We will try to do
15 that anyway. Anything else we need to talk about before we
16 have the jury come back in, Mr. Umina?

17 MR. UMINA: No.

18 THE COURT: Ms. Durst.

19 MS. DURST: I don't believe so, Your Honor. Thank
20 you.

21 THE COURT: Outstanding.

22 Sir, may we have our jury then, please.

23 (Jury entered the courtroom, and the following transpired
24 in open court.)

25 THE COURT: Mr. Faulkner, I will remind you, you

11:30:20 1 remain under oath.

11:30:20 2 Mr. Umina, you may proceed when you are ready.

11:30:23 3 MR. UMINA: Thank you, Your Honor.

11:30:24 4 CROSS-EXAMINATION

11:30:24 5 BY MR. UMINA:

11:30:26 6 Q. Good morning, Mr. Faulkner. My name is Ryan Umina. I
11:30:29 7 believe we met down at your deposition in Florida?

11:30:31 8 A. Yes, sir.

11:30:32 9 Q. First question, Mr. Faulkner, you acknowledge that there
11:30:39 10 is at least a possibility that the defendant is lying about
11:30:47 11 what happened here?

11:30:50 12 A. I wouldn't know.

11:30:52 13 Q. You wouldn't know. Well, if you wouldn't know, how can
11:30:57 14 you say what he did was objectively reasonable?

11:31:00 15 A. Based on what I reviewed.

11:31:02 16 Q. We'll get into that. Mr. Faulkner, you lied under oath
11:31:10 17 during the pendency of this case, didn't you?

11:31:13 18 A. No, sir.

11:31:17 19 Q. I am glad you said that. We asked you down in Florida
11:31:25 20 during your sworn deposition -- Mr. Prince, what line were we
11:31:29 21 at?

11:31:32 22 MR. PRINCE: Page 20, line 5 through 10.

11:31:37 23 BY MR. UMINA:

11:31:37 24 Q. We asked you about working at the Port Columbus airport
11:31:43 25 as an officer back in 2000, right? That's when you started

11:31:48 1 there?

11:31:49 2 A. I believe.

11:31:51 3 Q. I will show you your CV in a moment. You said that was
11:31:55 4 voluntary. I asked you if that was a voluntary position, and
11:31:58 5 you said, "Yes, it was not paid." It was after 9-11 that you
11:32:04 6 went there to assist. That's what you said, isn't it?

11:32:07 7 A. Yes, sir.

11:32:08 8 Q. Sir, you started that job in the year 2000, didn't you?

11:32:14 9 A. If that's what is on the resume, it's wrong because I
11:32:18 10 started after 9-11; that's why I went there.

11:32:21 11 Q. Sir, you never corrected your resume, did you?

11:32:24 12 A. No, but I didn't know it was incorrect.

11:32:26 13 Q. You can acknowledge that 9-11 happened in 2001?

11:32:35 14 A. I do recall, yes.

11:32:36 15 Q. So it was impossible, right? It was impossible? You
11:32:40 16 lied here, didn't you?

11:32:42 17 A. I think that is a ridiculous statement, but go ahead.

11:32:46 18 Q. That's funny because you gave testimony in another case
11:32:49 19 about this very topic, Mr. Faulkner. You gave testimony in a
11:32:53 20 case out of the Southern District of Ohio, *Melissa Stanford*
11:32:58 21 *vs. Jacob Lincoln* (phonetic). Do you remember that case?

11:33:00 22 A. Yes.

11:33:01 23 Q. Let's look at what you said then. Let me read you
11:33:07 24 something they asked you. This is in response to a question
11:33:10 25 that was asked on the application for employment at the Port

1 Columbus International Airport. The question says, "Briefly
2 describe why you would like to be a law enforcement officer at
3 the Port Columbus airport," and the response that is provided
4 there, I am assuming in your hand is as follows: "This would
5 once again give me a chance to do some uniform patrol work.
6 It would give me some firsthand contact with the public, which
7 would be make me better instructor at OPOTA. It would allow
8 me to practice some of the communication tactics that I
9 instruct. It would also allow me to better serve the officers
10 I defend as a use of force expert by showing I am current and
11 active in the profession. Lastly, it would give me a chance
12 to work with the general public, which I would enjoy."

13
14 A. Nowhere in there do you say a word about 9-11, do you.

15 A. No.

16 Q. On your application for this job. Is that a yes?

17 A. I said no. It's not in there.

18 Q. And you actually wrote that it would allow you to better
19 serve officers, like the defendant, that you defend as a use
20 of force expert, because you weren't active in the profession,
21 were you?

22 A. I was not doing road patrol at the time, no, sir.

23 Q. Okay. You lied just now, didn't you, Mr. Faulkner?

24 A. No, sir.

25 Q. Okay. So you provided your CV that you provided in a

1 number of cases. All of them have said the year 2000. You
2 filled out an employment application supposedly on the heels
3 of 9-11 in which you don't mention 9-11 at all, but rather
4 mention that you want to do what you are doing right now,
5 being compensated at \$250 an hour, and you still are going to
6 look this jury in the eyes and tell us that you didn't lie to
7 us during that deposition?

8 A. Absolutely.

9 MR. UMINA: Wow.

10 MS. DURST: Your Honor, can we refrain from the
11 comments.

12 THE COURT: Enough.

13 MR. UMINA: Yes, Your Honor.

14 BY MR. UMINA:

15 Q. Your opinion is for sale, isn't it, Mr. Faulkner?

16 A. Absolutely not.

17 Q. Okay. So you have been retained in over 450
18 police-related cases, 90 to 95 percent, and you have already
19 told the jury today the number of cases where you testified
20 that the use of force was not objectively reasonable, out of
21 even 400 of those cases, is zero?

22 A. Correct, sir. If it was unreasonable, I wouldn't have
23 taken the case.

24 Q. And you don't think that, let's say one out of 400 cases,
25 .25 percent chance you were wrong?

11:36:03 1 A. No, sir.

11:36:03 2 Q. You were right every time, huh?

11:36:05 3 A. I wouldn't take the case if I didn't believe in it.

11:36:09 4 Q. Zero for 450?

11:36:11 5 A. Yes, sir.

11:36:12 6 Q. And the law firm representing the defendant, two years

11:36:22 7 ago, you had been retained by them 50 to 70 times?

11:36:28 8 A. That was my best guess.

11:36:30 9 Q. So -- and you have taken more cases with them since this,

11:36:34 10 haven't you?

11:36:34 11 A. I am sure I have.

11:36:35 12 Q. So they have paid you hundreds of thousands, if not over

11:36:38 13 a million dollars, to testify and to state that the officer

11:36:44 14 they are defending did not act objectively reasonable?

11:36:48 15 A. The way you are putting it is offensive. They paid me

11:36:52 16 for my time. My time is compensated, yes, sir.

11:36:55 17 Q. And you have earned hundreds of thousands of dollars from

11:36:58 18 their firm?

11:36:59 19 A. Yes.

11:37:00 20 Q. And you will continue to earn money from their firm,

11:37:01 21 won't you?

11:37:01 22 A. If I take cases, yes, sir.

11:37:02 23 Q. And again, so out of 400 you have worked for them 50 to

11:37:07 24 70 times. So I mean we are talking about more than ten

11:37:10 25 percent if not close to 20 percent, of all of the work that

11:37:15 1 you get as an expert witness is for this law firm, isn't it?

11:37:21 2 A. Yes, sir.

11:37:26 3 Q. As you have already said, you don't take cases against
11:37:30 4 law enforcement officers, do you?

11:37:32 5 A. I explained it, yes, sir.

11:37:35 6 Q. Would you agree with me that would indicate that your
11:37:38 7 opinion is biased?

11:37:40 8 A. Not at all.

11:37:41 9 Q. You realize Mr. Root, he has taken a number of cases on
11:37:47 10 either side, and he has defended all sorts of people, and he
11:37:51 11 also stood up and said when police officers do things wrong.
11:37:56 12 Are you aware of that?

11:37:57 13 A. I don't know what his cases were, sir.

11:38:00 14 Q. Let's talk about physical evidence, cold hard facts that
11:38:09 15 are unchangeable, and subjective evidence. I'd like to talk
11:38:13 16 with you about our questioning previously there.

11:38:18 17 So we asked you, "You would consider physical evidence to
11:38:22 18 be more reliable than subjective recollections of
11:38:26 19 individuals?" Your answer to start with was, "It could be."
11:38:32 20 And that -- is a yes?

11:38:33 21 A. Yes.

11:38:34 22 Q. And you know that the physical evidence in this case is
11:38:38 23 bad for the defendant, don't you?

11:38:40 24 A. No, sir.

11:38:41 25 Q. That's your opinion?

11:38:43 1 A. Yes, sir.

11:38:44 2 Q. Okay. And then you tried to wiggle out of this. We
11:38:49 3 asked, "Well, why wouldn't it be?" And you said, "It depends
11:38:53 4 on the physical evidence." Again, trying to make it so that
11:39:01 5 subjective evidence, like from individuals, is more reliable
11:39:05 6 than cold hard facts. That's what you said, isn't it?

11:39:08 7 A. I have already stated to the jury what cold hard facts
11:39:13 8 are and what is just speculation.

11:39:16 9 Q. Okay. Like for instance, the Jeep being in neutral, that
11:39:21 10 is a cold, hard fact in this case, isn't it?

11:39:23 11 A. It is.

11:39:23 12 Q. And any explanation for how that Jeep got into neutral is
11:39:28 13 merely speculation, isn't it?

11:39:29 14 A. Yes, sir.

11:39:30 15 Q. Other than it would have had to have been in neutral when
11:39:33 16 the defendant shot and killed Philip Rhoades, anything else is
11:39:38 17 speculation, isn't it?

11:39:38 18 A. I disagree with that completely, sir.

11:39:40 19 Q. Sir, you just said anything as to how the Jeep got in
11:39:43 20 neutral is speculation, and then you just disagreed with me
11:39:46 21 that anything other than the Jeep being in neutral is not
11:39:51 22 speculation, do you realize that?

11:39:52 23 A. No, sir. You didn't ask that question.

11:39:54 24 Q. Okay. You would agree with me that any explanation other
11:40:02 25 than the Jeep already being in neutral when the defendant shot

1 and killed him, is mere speculation, correct?

2 A. Yes.

3 Q. Thank you. And then when we asked you, "You would agree
4 that physical evidence is what it is. You can see it, measure
5 it, take pictures of it. There is no question in that regard;
6 is that correct?" And here you still wouldn't give us a yes.
7 You said, "Well, let's do it this way: If there were seven
8 casings found and the officer said, I don't know, I think I
9 shot five times, the casings will tell the number of times it
10 was shot."

11 You realize that is a contradictory statement by you in
12 and of itself. You are actually agreeing there as you are
13 trying to disagree that physical evidence is more reliable
14 than subjective evidence?

15 A. I don't see it that way.

16 Q. Okay. But the officer said, you know, I was moving here
17 and casings don't do anything in terms of disproving or
18 proving where the officer was or wasn't at the time. You
19 know, he pulled that trigger per the specific casings. And
20 then we said, It could be or could not be, I mean --

21 MS. DURST: Your Honor, may I object to this
22 particular line of questions. May we approach?

23 THE COURT: What is the question?

24 MS. DURST: I think he trying is trying to impeach
25 Mr. Faulkner's testimony. He hasn't asked a question to

11:41:30 1 Mr. Faulkner and got an answer to begin with.

11:41:34 2 THE COURT: Lack of foundation. Make that objection.

11:41:37 3 MR. UMINA: Your Honor --

11:41:38 4 THE COURT: Hold on. Understood. Object if
11:41:40 5 necessary. Mr. Umina, ask your question, sir.

11:41:44 6 MR. UMINA: Thank you, Your Honor.

11:41:46 7 BY MR. UMINA:

11:41:47 8 Q. Then we say, "It could be or couldn't be. I mean, if he
11:41:50 9 says I was here and he found casings from him 50 yards away,
11:41:53 10 it would probably disprove that he actually stood in the area
11:41:58 11 where he believed him to be. Then the physical evidence would
11:42:03 12 say, wait a minute, it may not tell you exactly where you are,
11:42:05 13 but we know you are not where you are stating you are at,
11:42:09 14 correct?" And even to that question you said, "That could
11:42:13 15 be." And, Mr. Faulkner, you tried to give an answer, some
11:42:18 16 sort of speculation, even in that hypothetical to discount the
11:42:23 17 value of physical evidence, didn't you?

11:42:25 18 A. No, sir.

11:42:25 19 Q. Sir, you said, "That could be, or again, it could be due
11:42:32 20 to foot traffic, something was kicked or carried away, you
11:42:35 21 know. There is all kinds of possibilities." That is what you
11:42:38 22 said, isn't it?

11:42:38 23 A. May I explain?

11:42:40 24 Q. Sure.

11:42:40 25 A. Thank you. We are talking about casings. And in the

1 same training course that Mr. Root had -- it used to be where
2 a normal gun, the casings go out in a certain direction all
3 right, and that was used in cases like this, that is, well a
4 person must have been standing so many feet away. My research
5 done by Force Science with multiple police departments and
6 thousands of rounds shot, found that in a standard shooting
7 position, when you pull the trigger, the casings may hit at
8 180 degrees area. And if there is any movement or changing of
9 the shooting posture, or position of the hand, it may be as
10 much as 360 degrees. That's what I was referring to. On top
11 of that, I did say correctly, and I will say it here too, if
12 you can say, well, they found a shell casing, it says nothing
13 because you don't know the ejection pattern of the gun, you
14 don't know where the officer was standing, you don't know the
15 position he held the firearm in, you know there was multiple
16 traffic in there after that, you -- and it was found a couple
17 days afterwards that, in that case, that casing has no
18 evidentiary value based on law enforcement training.

19 Q. Sir, we can see right here that's not what you said in
20 your deposition, correct? You said, "Or again, it could be
21 due to foot traffic, something was kicked or carried or, you
22 know, there is all kinds of possibilities there."

23 A. Is that not what I just said?

24 Q. You just gave a three-minute explanation on the direction
25 of shell changes being ejected from a gun. You did not state

11:44:26 1 all the things you just said to the jury, anything like that
11:44:28 2 to us, did you? Your words are right here on the screen, sir.
11:44:32 3 A. I know that. You didn't ask any more questions. I
11:44:37 4 answered your question. If you wanted a full explanation, you
11:44:39 5 could have asked for it, sir.
11:44:40 6 Q. Okay. But you do agree as a matter of principle,
11:44:46 7 physical evidence is more reliable than subjective evidence,
11:44:51 8 isn't it?
11:44:52 9 A. Correctly related physical evidence is.
11:44:56 10 Q. And it's more reliable than recollections as a general
11:44:59 11 rule, isn't it?
11:45:00 12 A. It may be.
11:45:03 13 Q. You said here, "I would say so."
11:45:05 14 A. It may be.
11:45:06 15 Q. You would agree those are two different answers?
11:45:09 16 A. I will agree, because after it was presented in here, as
11:45:12 17 I said and will continue to say, what you are saying is
11:45:15 18 physical evidence I disagree with.
11:45:17 19 Q. Let's talk about the use of force policies for a moment.
11:45:26 20 You would agree that the defendant was prohibited from using
11:45:35 21 deadly force to stop an individual on mere suspicion of a
11:45:39 22 crime or simply because the individual runs away?
11:45:42 23 A. Yes, sir.
11:45:42 24 Q. You would agree that was prohibited, right?
11:45:46 25 A. Yes, sir.

11:45:48 1 Q. You said that you relied on trial testimony today,
11:45:51 2 correct?

11:45:52 3 A. Yes, sir.

11:45:53 4 Q. You were here when Lieutenant JP Branham testified,
11:45:58 5 correct?

11:45:59 6 A. I was.

11:46:00 7 Q. And you heard him state three times that Corey Love lied
11:46:09 8 under oath, didn't you?

11:46:15 9 A. In what context? I don't recall.

11:46:18 10 Q. I walked up to the overhead. I showed Lieutenant Branham
11:46:22 11 what he wrote. And then I showed him portions of Corey Love's
11:46:26 12 sworn deposition testimony, and I said, "Did you provide false
11:46:31 13 information here or did he lie?" And he very quickly informed
11:46:36 14 us on three occasions that Corey Love lied.

11:46:39 15 A. I would like to see what you are talking about.

11:46:42 16 Q. Sir, you were at the trial?

11:46:44 17 A. I was. And I would like to see what you are talking
11:46:47 18 about.

11:46:48 19 Q. Sir, you just testified that you are basing your opinion
11:46:53 20 on what you saw at trial, and you don't recall the testimony
11:46:57 21 at trial?

11:46:59 22 A. Sir, with all due respect, since you won't show it to me,
11:47:03 23 it makes me very suspicious. I would like to see what you are
11:47:03 24 talking about.

11:47:06 25 Q. Sir, I don't have the transcript of the trial available.

11:47:09 1 We are still in the trial.

11:47:10 2 A. I'm sorry. I don't recall what you are talking about.

11:47:11 3 Q. Well, doesn't that call into question you relying on any

11:47:15 4 of the other evidence presented here?

11:47:16 5 A. Sir, you can call into question anything you would like.

11:47:19 6 Q. Sir, your testimony is that you don't recall the

11:47:24 7 testimony of the investigating state trooper as it relates to

11:47:29 8 the only other witness to this shooting during this trial --

11:47:32 9 that's your testimony?

11:47:33 10 A. I do not recall every word that was said. I would like

11:47:35 11 to see what you are referring to.

11:47:37 12 Q. I just explained to you -- I mean, I thought that would

11:47:40 13 jog your memory, when I walked up to the overhead. I put

11:47:43 14 statements side-by-side as a little bit of to do. You don't

11:47:46 15 recall that?

11:47:46 16 A. I don't, and if you are not prepared to do it, I am not

11:47:49 17 going to answer something I don't know if what you are saying

11:47:52 18 is correct or accurate.

11:47:53 19 Q. So again, your testimony was just that you relied on the

11:47:56 20 evidence that you heard at trial, but you don't remember the

11:47:58 21 evidence heard at trial?

11:48:00 22 A. I didn't say that. It's clear on record what I said.

11:48:06 23 Q. Okay. You agree that the Jeep had left no distinctly

11:48:14 24 visible evidence that it's tires had been spinning, correct?

11:48:19 25 A. I don't know.

11:48:21 1 Q. These are your words, sir. I wrote this from something
11:48:29 2 you read in this case. So you disagree with this now? That
11:48:32 3 quote, that is a direct quote from something that you
11:48:36 4 authorized in this case.

11:48:38 5 A. And I agree with it. There was a scratch up on the
11:48:41 6 ground; I don't know what left it. I don't know if it was the
11:48:45 7 Jeep or some other vehicle when they were there before
11:48:50 8 turning. I don't know. There was ground disturbance. My
11:48:52 9 point that I made to the jury, I have no idea what to assign
11:48:56 10 that ground disturbance to.

11:48:57 11 Q. Sir, you wrote in this case, "The Jeep had left no
11:49:04 12 distinctly visual evidence that its tires had been spinning."

11:49:09 13 A. And I agree with that.

11:49:11 14 Q. I want to show you two photos here. You see this area
11:49:17 15 right here, sir?

11:49:18 16 A. Yes.

11:49:19 17 Q. Right here behind the Jeep's tire. Okay. Do you see how
11:49:23 18 the grass not only to the tire and the bumper are actually --
11:49:28 19 I mean, right on the wheel -- pressed up against it and fully
11:49:33 20 up into the well?

11:49:35 21 A. Yes.

11:49:35 22 Q. You would agree with me that if a car was driving
11:49:38 23 straight and had just driven over this grass, that it would no
11:49:44 24 longer be standing straight up into the well there? You would
11:49:48 25 agree with that, wouldn't you?

11:49:49 1 A. It's possible. But if you look at the line of travel
11:49:52 2 that is here, it seems like it is to the right of what you are
11:49:58 3 talking about in the grass, and if the car -- if the Jeep was
11:50:01 4 stopping, it had to be slowing to have been stopped there and
11:50:04 5 the wheel turned up, it might have stood the grass up. I
11:50:07 6 don't know.

11:50:07 7 Q. Sir, you reviewed all the evidence in this case?

11:50:09 8 A. Yes.

11:50:09 9 Q. You know that the defendant had stated repeatedly that
11:50:13 10 the Jeep did not stop, veer, or slow down?

11:50:18 11 A. When it was coming at him, yes.

11:50:20 12 Q. Okay. This is it's final resting place, sir. These
11:50:24 13 marks are not aligned with the Jeep's tires. This is the
11:50:28 14 vegetation behind it. And all of this, okay, all of this, if
11:50:33 15 he went straight at the defendant, all of this vegetation
11:50:40 16 would be disturbed, wouldn't it?

11:50:43 17 A. This is the final resting place of the vehicle. You do
11:50:47 18 not know, and I have heard this from everybody's testimony,
11:50:51 19 Mr. Root said the same thing. You don't know where the
11:50:53 20 officer was standing. You don't know where the Jeep was when
11:50:57 21 shots were fired. You don't know which round is the one that
11:51:00 22 actually hit Mr. Rhoades. You don't know any of that. And
11:51:02 23 then you are trying to make stuff up on this line or that
11:51:06 24 line. It has no meaning.

11:51:07 25 Q. Sir, it was the defendant who stated that the Jeep

11:51:11 1 traveled straight at him and did not veer. Are you aware of
11:51:14 2 that as someone who reviewed the evidence in this case?

11:51:16 3 A. That is why he shot.

11:51:19 4 Q. And, sir, let's think about this. If the vehicle is
11:51:24 5 accelerating straight and not veering, it would have to travel
11:51:28 6 straight at him. So how is the Jeep in this direction --
11:51:35 7 let's just back it up. This is where it would have to be,
11:51:39 8 right? You would agree with that? If this vehicle just
11:51:42 9 traveled straight at the defendant, then this is what would be
11:51:47 10 directly behind the Jeep in the moments before.

11:51:52 11 A. If you want to make a hypothetical on where the deputy
11:51:55 12 was, and you want me to say based on that hypothetical, you
11:52:00 13 don't know where the deputy was standing.

11:52:01 14 Q. Sir, I don't understand how this is a hypothetical if
11:52:04 15 this is the final resting place of the Jeep. That is the
11:52:07 16 front of the car. That is the back of the car, and the
11:52:08 17 defendant says that it traveled straight. This is not a
11:52:12 18 hypothetical.

11:52:13 19 A. It is, sir.

11:52:15 20 Q. Your testimony is that the Jeep, traveling in a straight
11:52:21 21 line as the defendant testified, is a hypothetical?

11:52:28 22 A. I am saying what you are trying to make -- you are making
11:52:31 23 a theory, which is fine. You are making an argument, which is
11:52:35 24 fine. I am saying you cannot scientifically say where the
11:52:37 25 deputy was and when that Jeep stopped. You don't where it

1 rolled to. We have got the wheel, as you can see there,

2 slightly toward the right. Was it that way all the time? I

3 don't know. You don't know. No one knows.

4 Q. Sir, I am not giving you a hypothetical. I am asking you

5 a question based upon the defendant's account of what occurred

6 at the moment force was used. And I am asking you questions

7 about that. Can you at least acknowledge that?

8 A. No, sir, because you are not asking me that. I am very

9 clear on saying Deputy Forsyth said he shot when the Jeep was

10 coming right at him. And then you are bringing that --

11 interjecting that with final resting place. That is not

12 correct.

13 Q. Coming right at him and not veering would indicate a

14 straight direction of travel. Right here is the opening where

15 he says he jumped out at. He would have -- the defendant

16 claims he was aggressively accelerating straight at him. What

17 I am asking you to do is consider, let's pull the Jeep

18 straight back, okay, straight back, and consider this. You

19 are telling me that is a hypothetical?

20 A. Yes, sir. That's your argument. That's all it is.

21 Q. Okay. Mr. Faulkner, were you here when this picture was

22 introduced at trial?

23 A. Yes.

24 Q. Do you recall the defendant attempting to introduce this

25 photo as evidence of wheel spinning?

11:54:09 1 A. It just -- I am not sure it said wheel spinning. I
11:54:14 2 thought it was a ground disturbance. I believe that's what
11:54:17 3 was said, a ground disturbance. I don't know what from.

11:54:23 4 Q. Do you recall Lieutenant Branham then, when I questioned
11:54:29 5 him about this photo further, acknowledging that it would have
11:54:34 6 been impossible for this to be evidence of tires spinning,
11:54:39 7 because the Jeep would have had to have been faced in a
11:54:42 8 completely perpendicular direction to the direction that it
11:54:46 9 allegedly traveled?

11:54:47 10 A. Yes, sir.

11:54:47 11 Q. Okay. So you and I can both acknowledge this is
11:54:51 12 impossible that this photo is evidence of tires spinning?

11:54:55 13 A. At what point? We have -- we have Deputy Forsyth saying
11:55:01 14 the Jeep pulled up and almost hit me, then pulled back and
11:55:05 15 made a three-point, which I don't know what that means. When
11:55:08 16 I pull in a parking space, and I'm over the line, and I
11:55:11 17 straighten the car? I don't know what a three-point turn is
11:55:14 18 in here. Again, you are trying to say that means it is going
11:55:17 19 in the opposite direction. I don't know where that came from.
11:55:21 20 I don't know what caused that ground disturbance. I don't
11:55:25 21 know. You don't know. No one knows.

11:55:27 22 Q. Sir, I am specifically focused on the moment in time and
11:55:32 23 the allegations of the actions of the Jeep that the defendant
11:55:36 24 is claiming as justification for utilizing deadly force in
11:55:41 25 this manner, just to clear up any discrepancy questions I am

11:55:44 1 asking you.

11:55:45 2 So what I am specifically concerned with is -- his claim
11:55:48 3 is that the tires started spinning, the engine started
11:55:54 4 revving, he claims it came at him and it did not veer, stop,
11:56:00 5 or slow down and then he claims that by shooting the driver,
11:56:04 6 the vehicle suddenly stopped in its tracks. Just so you
11:56:09 7 understand, that's right where I am going to ask you all the
11:56:12 8 questions about. And again, do you recall that the defendant
11:56:17 9 attempted to offer this photo into evidence as evidence of the
11:56:22 10 tires spinning in the exact moment I just described to you?

11:56:25 11 A. I don't know. It's ground disturbance. I don't know
11:56:28 12 when it was.

11:56:29 13 Q. Do you recall the defendant here at trial introducing
11:56:34 14 this photograph as evidence of the tires spinning just before
11:56:39 15 the moment the defendant shot and killed Mr. Rhoades?

11:56:41 16 A. I don't believe anybody could say when it was with any
11:56:45 17 kind of accuracy.

11:56:46 18 Q. And you -- that wasn't my question. I am again asking
11:56:50 19 you about the testimony and evidence here at trial. And my
11:56:56 20 question to you is: Do you recall the defendant attempting to
11:57:01 21 introduce this photo during Lieutenant Branham's testimony as
11:57:06 22 evidence of tires spinning in the moment before the defendant
11:57:10 23 killed Mr. Rhoades?

11:57:12 24 A. I don't recall that specifically.

11:57:13 25 Q. So that is another piece of critical evidence in this

11:57:16 1 case that you don't recall that was heard at trial, correct?

11:57:20 2 A. Yes, and I would have disregarded it, because it's not

11:57:24 3 scientifically based.

11:57:26 4 Q. Do you recall Lieutenant Branham testifying that this

11:57:30 5 could not have been evidence of tires spinning?

11:57:36 6 A. I don't know how anybody could make that statement.

11:57:41 7 Q. You visited the site, correct?

11:57:43 8 A. I did.

11:57:43 9 Q. Okay. You recall there is a ditch right here?

11:57:48 10 A. Yes, sir.

11:57:48 11 Q. Sir, do you not remember that entire line of questioning

11:57:51 12 that I had with Lieutenant Branham at this trial?

11:57:54 13 A. I do, and I thought it was -- I'm sorry. I thought it

11:57:58 14 was off base. I thought it was you're presenting a theory

11:58:02 15 with no scientific basis behind it.

11:58:05 16 Q. Are you saying Lieutenant Branham was wrong also when he

11:58:07 17 testified that these could not have been the marks?

11:58:10 18 A. Specifically what marks?

11:58:12 19 Q. Right here in this photo that I am pointing at.

11:58:15 20 A. Marks -- that's ground disturbance in relation to what?

11:58:19 21 Q. Sir, I just explained to you for probably 30 seconds

11:58:23 22 about the moment in time that I am focused on and the actions

11:58:26 23 of the Jeep. Do you recall that question?

11:58:27 24 A. I do. And I said then, and will repeat, I don't know how

11:58:31 25 anyone could make any kind of definitive statement in terms of

11:58:35 1 analysis of what that is.

11:58:36 2 Q. Because that's physical evidence that disproves the
11:58:39 3 defendant's theory, correct?

11:58:40 4 A. I don't think it does.

11:58:41 5 Q. You have already agreed that if the defendant violated
11:58:45 6 the Marion County Sheriff's Department's use of force policy,
11:58:48 7 he acted objectively unreasonably, correct?

11:58:52 8 A. That would have been contrary to training and practice.

11:58:54 9 Q. Sir, that was not my question. I am asking you, you have
11:58:57 10 already agreed under oath in this case, that if the defendant
11:58:59 11 violated the Marion County Sheriff's Department's use of force
11:59:02 12 policy, he acted objectively unreasonable, correct?

11:59:06 13 A. No, sir. I explained before why I don't use that term.
11:59:09 14 I use the term "contrary to training and practice." They will
11:59:13 15 decide if it is objectively unreasonable. Unreasonable.
11:59:17 16 That's the jury's decision.

11:59:19 17 Q. Sir, didn't you just offer your expert opinion that the
11:59:22 18 defendant did not act objectively unreasonably -- that he
11:59:27 19 acted objectively unreasonably, didn't you just offer that as
11:59:29 20 your expert opinion in this case?

11:59:31 21 A. He acted in line with the policies and training, and in
11:59:36 22 line with *Graham vs. Connor*. That's what I said. They will
11:59:40 23 make the objective reasonable analysis. That is what
11:59:43 24 objective reasonableness, it's what the jury thinks.

11:59:51 25 Q. Sir, you have already agreed in this case as well that

11:59:54 1 the Jeep was not moving towards the defendant when he opened
11:59:57 2 fire and shot Philip Rhoades on August 2, 2017; that this
12:00:02 3 shooting was objectively unreasonable, correct? You have
12:00:06 4 already agreed to that in this case?
12:00:07 5 A. If the Jeep was not moving, yes. If the Jeep was
12:00:11 6 stationary, that would be contrary to policy and training.
12:00:19 7 Q. A few more questions for you, Mr. Faulkner. You just
12:00:29 8 testified, okay, you said things that we know. You said we
12:00:35 9 know he almost struck a vehicle, Mr. Rhoades, when he was
12:00:38 10 driving, correct? That's what you testified to?
12:00:41 11 A. Yes, sir.
12:00:42 12 Q. You have reviewed the radio transmissions in this case?
12:00:44 13 A. Yes, sir.
12:00:45 14 Q. You acknowledge there is not a single radio transmission
12:00:48 15 indicating that Mr. Rhoades did that, correct?
12:00:50 16 A. Yes, sir.
12:00:50 17 Q. You also -- you were at trial and heard the defendant
12:01:06 18 testify that he was waiting for a car to pass before he went
12:01:09 19 down the road?
12:01:10 20 A. Yes, sir.
12:01:11 21 Q. Okay. And you also agree there was no radio traffic
12:01:15 22 about that, correct?
12:01:15 23 A. Yes, sir.
12:01:16 24 Q. And you also heard him testify that he radioed and had to
12:01:21 25 let the girl go past, didn't you?

12:01:24 1 A. Yes, sir.

12:01:24 2 Q. We -- you said, "We don't know what vehicles went down
12:01:32 3 that road," sir. That was your testimony?

12:01:35 4 A. Yes, sir.

12:01:36 5 Q. You acknowledge that when photos were taken of the scene
12:01:40 6 40 minutes later, there were no vehicles there?

12:01:43 7 A. There was a Jeep and a cruiser. That was all.

12:01:46 8 Q. That was all. And typically after a shooting, a police
12:01:50 9 agency would secure that scene, correct?

12:01:53 10 A. Well, no, because what you are going to do is officers
12:01:59 11 are going to respond to make sure everybody is okay in that
12:02:02 12 and an ambulance is going to be in there, and ambulance --
12:02:05 13 human life always takes precedence over evidence. And if you
12:02:10 14 have ever seen the way a fire department comes in, the squad
12:02:13 15 comes in, they may mess up the crime scene. You don't stop
12:02:18 16 that because they have got to treat the people, and then they
12:02:21 17 have got to get out of there, and they may mess it up there.

12:02:26 18 Q. Sir, you would agree with me that Deputy Love didn't
12:02:32 19 actually know what was happening in the seconds just prior to
12:02:37 20 the shooting, after the defendant jumped out of the car, and
12:02:43 21 while he was shooting, correct?

12:02:44 22 A. I will agree, yes.

12:02:45 23 Q. Because Deputy Love didn't actually see the defendant
12:02:51 24 pulling the trigger, did he?

12:02:52 25 A. No, sir.

12:02:53 1 Q. He was running around the vehicle, right?

12:02:58 2 A. Yes, sir.

12:02:59 3 Q. And that vehicle, his vehicle, was moving, correct?

12:03:02 4 A. Yes, sir.

12:03:03 5 Q. And as he is looking back, he says he sees the back of

12:03:09 6 the Jeep disappear, right? In his testimony, Mr. Love, he

12:03:14 7 says when is walking alongside the cruiser, he sees the back

12:03:21 8 of the Jeep disappear. That's what he said, right?

12:03:23 9 A. I don't remember "disappear." I remember he said the

12:03:25 10 back of the Jeep was moving. I don't remember "disappear."

12:03:30 11 Q. It could have disappeared to him as the back of the Jeep

12:03:32 12 was moving because he is walking by a moving car, so that Jeep

12:03:35 13 sitting still, he is walking by a moving car, and now the top

12:03:38 14 is disappearing behind him?

12:03:42 15 A. That's not what he said.

12:03:44 16 Q. I know that's not what he said, but that could have

12:03:47 17 happened, couldn't it?

12:03:47 18 A. That's an argument and a theory you can put forth.

12:03:51 19 Q. You said you don't care what the distance of the roadway

12:03:57 20 is?

12:04:00 21 A. In terms of what happened, not really. I mean, for the

12:04:07 22 sketch afterwards, yes, you need to mark those things. But

12:04:11 23 the reason I say I don't care is we know it's approximately

12:04:14 24 213 feet, but you don't know the speed of travel, you don't

12:04:21 25 know the location when radio transmissions were made. That's

12:04:25 1 why objective findings or any kind of scientific analysis when
12:04:30 2 you are starting off with total unknowns.

12:04:33 3 Q. Sir, they are not total unknowns. You would acknowledge
12:04:36 4 that radio traffic starting and stopping at a definitive time,
12:04:40 5 using a mathematical calculation, are both not unknowns,
12:04:43 6 correct?

12:04:44 7 A. The only known there is approximately 16 seconds.

12:04:48 8 Q. And you would agree with that 16-second timeline is very
12:04:52 9 bad for the defendant, isn't it?

12:04:53 10 A. I don't think so at all.

12:04:54 11 Q. Because you don't believe any objective evidence is bad,
12:04:57 12 do you?

12:04:58 13 A. I don't know how to answer that, sir.

12:05:00 14 Q. The only thing you are relying on in this case is
12:05:02 15 objective evidence, isn't it?

12:05:04 16 A. That's wrong.

12:05:04 17 Q. Sir, you just sat here and discounted physical objective
12:05:09 18 evidence for at least 30 minutes during your testimony.

12:05:11 19 A. Because the fact is, sir, it is not physical objective
12:05:15 20 evidence. It is not.

12:05:19 21 Q. You mean the unchangeable facts of the scene are not
12:05:23 22 physical evidence? That's your testimony today?

12:05:27 23 A. My testimony is the only thing known is the final resting
12:05:33 24 place of the Jeep --

12:05:34 25 Q. Sir --

12:05:35 1 A. -- the final resting place of cruiser, and a reference
12:05:39 2 point.

12:05:39 3 Q. Sir, you took issue with this time distance calculation,
12:05:46 4 right? You said that you were offended?

12:05:50 5 A. It was a misuse of his training.

12:05:52 6 Q. Sir, you made those same calculations and discussed time
12:05:57 7 distance calculations with us during your deposition, didn't
12:06:00 8 you?

12:06:00 9 A. To show how it is a complete unknown. I said repeatedly
12:06:05 10 in there, I don't know because this is a "could have". That
12:06:08 11 is all -- that is all everything is, is an argument. It could
12:06:11 12 have been is a theory. Nobody knows.

12:06:14 13 Q. Sir, you take surveys and do studies as part of something
12:06:20 14 that you do, right?

12:06:20 15 A. Yes, sir.

12:06:21 16 Q. There is a bunch of unknown variables, but what you want
12:06:24 17 to do when you are attempting to discern information is figure
12:06:29 18 out what those variables might be, and then attempt to see
12:06:34 19 what the scenarios could be based on those variables, correct?

12:06:38 20 A. Yes, we do look at officer subject factors, special
12:06:42 21 circumstances in the survey, yes, sir.

12:06:43 22 Q. I'm saying as a general rule of analyzing information, if
12:06:47 23 there are variables, you can get a range of possibilities,
12:06:53 24 right, and limit it based on what variables could have
12:06:57 25 occurred or were likely to have occurred, for instance, like

12:07:00 1 the speed of the vehicle?

12:07:07 2 A. Speed of the vehicle is unknown. Scientific evidence is
12:07:12 3 the length of the road and final rest place. That's all you
12:07:14 4 have.

12:07:14 5 Q. Okay. So you talked about the Jeep. The Jeep could have
12:07:25 6 gone anywhere, right? The Jeep could have gone anywhere. It
12:07:29 7 could have climbed a mountain, right? That's what you said,
12:07:32 8 the Jeep could have climbed a mountain?

12:07:33 9 A. It could.

12:07:35 10 Q. Are you saying that if Mr. Rhoades would have attempted
12:07:37 11 to climb the mountain in that Jeep, the defendant would have
12:07:40 12 been justified in shooting him and killing him?

12:07:44 13 A. Absolutely not.

12:07:45 14 Q. Thank you. So we were talking about witness statements.
12:07:51 15 You said the right thing to do is to separate them and not let
12:07:56 16 them talk to anybody, correct?

12:07:57 17 A. Yes, sir. Other than you -- in training we tell them,
12:08:04 18 you need to give the immediate information. In other words,
12:08:08 19 the suspect has fled, was in a green car heading this
12:08:12 20 direction, but that's all. Other than that, we don't go into
12:08:16 21 any detail because of what we have talked about in terms of
12:08:20 22 emotional distress.

12:08:21 23 Q. Do you recall Sergeant Branham testifying that both
12:08:24 24 Corey Love and the defendant informed him that they wanted to
12:08:27 25 give their interviews together?

12:08:29 1 A. I believe at the same time, yeah.

12:08:31 2 Q. No. He had an individual conversation with both
12:08:35 3 Corey Love and the defendant, and he actually noted in his
12:08:38 4 report that they both informed him that they wanted to be
12:08:42 5 interviewed together. Do you recall that testimony?

12:08:44 6 A. Yes, and if they wanted to, that's fine. I would not
12:08:47 7 allow it. I would have separated them.

12:08:49 8 Q. And Lieutenant Branham correctly did.

12:08:51 9 A. He did. He did.

12:08:54 10 Q. Do you recall that Corey Love had lied about that, and
12:08:57 11 that is one of the things that Lieutenant Branham stated, that
12:09:00 12 Corey Love lied about under oath?

12:09:02 13 A. What are you referring to?

12:09:04 14 Q. Lieutenant Branham's testimony here at trial, sir.

12:09:08 15 A. Again, what are you talking about?

12:09:12 16 Q. I will move on. I will move on. You agree that the
12:09:21 17 bullets fired by the defendant did not stop the Jeep, correct?

12:09:26 18 A. Bullets will not stop a vehicle, but it can disrupt the
12:09:32 19 driving pattern of the operator.

12:09:36 20 Q. So again, that's correct, right? Bullets don't stop
12:09:40 21 moving vehicles?

12:09:40 22 A. They don't.

12:09:42 23 Q. And you agree that if the defendant testified the Jeep
12:09:46 24 was coming at him in an aggressive manner, that is the basis
12:09:50 25 for your opinion for his use of deadly force being justified

12:09:55 1 allegedly, correct?

12:09:56 2 A. Yes.

12:09:56 3 Q. That was it?

12:09:57 4 A. Yes, sir.

12:09:58 5 Q. How do you do that, yet you have no explanation from how
12:10:05 6 this -- for how this aggressively moving Jeep magically
12:10:10 7 stopped?

12:10:11 8 A. I don't think it magically stopped at all. It was in
12:10:14 9 neutral, it rolled a little bit, and stopped. That's not
12:10:15 10 magic. That's normal operation of a vehicle.

12:10:22 11 Q. And as you said, the only reasonable explanation is that
12:10:26 12 it was in neutral right?

12:10:29 13 A. Final resting place had to be in neutral.

12:10:35 14 Q. You mentioned the term -- let me back up real quick. Two
12:10:43 15 more questions for you. Okay?

12:10:45 16 All of the things that the defendant claims that he did
12:10:52 17 in this short window of time was travel down a 212-foot road,
12:10:57 18 see the Jeep coming towards him where he would have had to
12:11:01 19 brake, see the Jeep coming towards him, the Jeep backs up, he
12:11:04 20 has to exit his cruiser, the defendant watches him attempt to
12:11:09 21 do a three-point turn, the defendant gives commands, the
12:11:14 22 defendant continues to give verbal commands, the Jeep revs its
12:11:18 23 engine, the defendant continues to give verbal commands, the
12:11:21 24 Jeep begins aggressively accelerating towards him, Defendant
12:11:27 25 Forsyth then fires seven rounds. He begins to do a tac

12:11:30 1 reload. He decides against doing a tac reload, and then he
12:11:35 2 reports shots fired. Sir, is it your testimony that that
12:11:38 3 16-second timeline is not very bad for the defendant?
12:11:41 4 A. Yes, sir, it is not.
12:11:42 5 Q. Okay. You mentioned a "kill box." Correct?
12:11:46 6 A. Yes, sir. That's what we refer to it as.
12:11:49 7 Q. You would agree with me that the only person facing an
12:11:56 8 armed individual who remained in their car on that day, was
12:12:00 9 Philip Rhoades, wasn't it?
12:12:02 10 A. That remained in their car, yes, sir.
12:12:04 11 Q. Philip Rhoades was not armed, was he? That is the
12:12:07 12 testimony. Philip Rhoades was not armed.
12:12:11 13 A. That is not the testimony at all. He was driving a 4,400
12:12:16 14 pound vehicle.
12:12:17 15 Q. You would agree with me based on your definition of a
12:12:20 16 kill box, that Philip Rhoades was the only person in the kill
12:12:23 17 box that day?
12:12:24 18 A. At the time it was fired, yes sir.
12:12:25 19 Q. The defendant killed him, didn't he?
12:12:28 20 A. The defendant fired to save his life, yes, sir.
12:12:30 21 Q. Sir, the defendant killed him, didn't he?
12:12:33 22 A. That was the ultimate result; yes, sir, it was.
12:12:37 23 Q. Thank you.
12:12:38 24 A. Yes, sir.
12:12:41 25 THE COURT: Any further questions, Mr. Umina?

12:12:42 1 MR. UMINA: No, Your Honor.

12:12:44 2 THE COURT: All right. Ms. Durst, any redirect?

12:12:47 3 MS. DURST: Very, very briefly, Your Honor.

12:12:49 4 THE COURT: You may proceed.

12:12:49 5 REDIRECT EXAMINATION

12:12:49 6 BY MS. DURST:

12:12:59 7 Q. Mr. Faulkner, Mr. Umina just spent, oh, about 45 minutes
12:13:04 8 with you, asking you a number of questions here today,
12:13:15 9 correct?

12:13:15 10 A. Yes, ma'am.

12:13:15 11 Q. Have any of the questions that he has asked you, have
12:13:19 12 they altered the opinions that you provided to the jury in
12:13:21 13 your direct testimony here today?

12:13:24 14 A. No, ma'am, not at all.

12:13:25 15 Q. Do you still believe based on the information that you
12:13:28 16 reviewed in this case, that Deputy Forsyth's actions on
12:13:34 17 August 2, 2017, complied with the Supreme Court guidelines and
12:13:36 18 the National Law Enforcement Operational Practices?

12:13:38 19 A. I do, ma'am.

12:13:39 20 Q. I just wanted to ask you this Port of Columbus, Port
12:13:43 21 Authority, did you lie about your job?

12:13:46 22 A. No. I went there after 9-11 just to stand at the
12:13:51 23 concourse, because they were working around the clock, and I
12:13:53 24 did that for a number of years just to help out.

12:13:55 25 Q. Well, let me ask you this: If Mr. Umina showed you some

deposition testimony from a *Stanford vs. Laconne* (phonetic)

case, and you testified about wanting to get some experience

to use to defend law enforcement officers, do you agree with

that?

A. Yes. You want to keep active on the road; yes, ma'am, I

did that. And then after the airport, I went to Mechanicsburg

as a road officer, promoted to lieutenant and chief. If you

want to stay in the profession, sure.

Q. And the opinions that you have provided on direct

examination and as well as just confirming that your opinions

still are the same, even in light of Mr. Umina's

cross-examination of you, do you still hold all those opinions

to a reasonable degree of certainty in your field of expertise

as determined by the Court?

A. Yes, ma'am, I do.

MS. DURST: One moment, Your Honor.

THE COURT: Certainly.

MS. DURST: Your Honor, I don't have any further
questions for Mr. Faulkner. Thank you.

THE COURT: Thank you.

Mr. Umina, anything further of Mr. Faulkner?

MR. UMINA: No, Your Honor.

THE COURT: May he be excused?

MS. DURST: He may, Your Honor.

THE COURT: Thank you. You may step down.

12:15:06 1 THE WITNESS: Thank you, sir.

12:15:08 2 THE COURT: All right. Ladies and gentlemen, we have
12:15:19 3 reached a good spot in our day to take our lunch break, so we
12:15:24 4 are going to do that now. We are going to give you an extra
12:15:27 5 few minutes today. There are a few things counsel and the
12:15:31 6 Court have to discuss before we are ready for you to resume
12:15:35 7 here in the courtroom, so if you could be back at 1:30, we
12:15:39 8 should be ready for you by then. But we will take our lunch
12:15:45 9 break now, and be ready to go back in here at 1:30.

12:15:49 10 Please continue to refrain from discussing the case with
12:15:52 11 anyone, including your fellow jurors, or anyone else. And
12:15:55 12 also please continue to refrain from any independent
12:15:58 13 investigation efforts not only about this case or any issues
12:16:01 14 discussed in this case.

12:16:02 15 With that said, have a pleasant lunch, and we will see
12:16:06 16 you at 1:30. Thank you all very much.

12:16:09 17 (Jury excused, and the following transpired in open
12:16:10 18 court.)

12:16:35 19 THE COURT: Any further witnesses you anticipate
12:16:37 20 calling, Ms. Durst?

12:16:37 21 MS. DURST: No. Defense will rest.

12:16:39 22 THE COURT: Any rebuttal from the plaintiff?

12:16:41 23 MR. UMINA: No, Your Honor.

12:16:41 24 THE COURT: Okay. With that then, we will give you
12:16:45 25 guys a break so you can catch your breath, and I will say grab

1 something to eat, but why don't we get back together at 1:00,
2 and we will go through the Court's proposed charge. You guys
3 have working copies. We will have a copy waiting for you at
4 1:00 with line numbers for you to reference. Again, please
5 take a look at the entire thing. Substantive instructions
6 with respect to this case are on pages ten through 19, but of
7 course, we can discuss any aspects of it.

8 Usually how I do this, I don't anticipate altering at
9 this point. I will go through each of the parties' proposed
10 instructions and let you know which made the cut, which
11 didn't. And then we can take up any objections, concerns, and
12 the like going forward from there. But hopefully that gives
13 you enough time to grab a protein bar and take a look at the
14 instructions. We will reconvene at 1:00 to do that. Okay.
15 Thank you all very much.

16 (Recess taken at this time 12:17 - 1:02.)

17 THE COURT: We're back on the record then. We are
18 convened for our charge conference. Did everyone have a
19 chance to read the Court's proposed charge?

20 MR. CARROLL: We have, Your Honor. I would also note
21 that the defendant will renew the Rule 50 motion with regards
22 to qualified immunity --

23 THE COURT: We will come back around to that. Let's
24 do our charge conference. And thank you for the reminder,
25 Mr. Carroll.

For the record, I will go through one by one everyone's proposed instructions. Then we can take up any concerns you have about the version that you have been provided. Starting with the plaintiff's amended proposed instructions that were filed back on February 25, '21, document 165. I don't believe we used instruction number one, mainly because it's really a statement of -- I don't want to say it's a statement of fact, but we have not incorporated plaintiff's number one. We did incorporate elements of plaintiff's proposed instruction number two as modified as the parties already saw, the substantive sections of the Court's proposed charge, and we will make a copy of the current form of the proposed charge and verdict form exhibits to the record as well.

The Court did not -- or rejected plaintiff's proposed number three given the parties' stipulation with respect to the question of color of state law. Plaintiff's proposed number four portions of it were adopted, so I would say plaintiff's four was used as modified. Same with respect to number five, instruction on damages.

With respect to six, that was incorporated in a modified version. Again, dealing not only nominal damages. The same with plaintiff's seven, another proposed instruction with respect to damages. Portions of that were incorporated as the parties can see, so I would say that was used as modified.

With respect to defendant's proposed instructions, which

1 were filed on January 14 of 2020, at docket 101. Defendant
2 proposed one was rejected for the same reasons plaintiff's
3 one. It's a summary of what this case is about. I think the
4 Court has covered that. Two was rejected and refused. Again,
5 it's an instruction "under color" of state law, which is
6 unnecessary at this point.

7 Defendant's three, portions of it were incorporated, as I
8 am sure the parties saw, so that one is modified.

9 Number four, same. Portions of it were incorporated in
10 part, so it has been incorporated as modified. Instructions
11 five, six -- five and six from defendant have not been
12 incorporated, and will not be used.

13 With respect to qualified immunity, we will come back
14 around to the Rule 50 motion on that question. That's a
15 question for the Court, not for jury resolution. So five --
16 defendant's five and six were not incorporated.

17 Defendant's seven has been incorporated, that is a
18 question of instruction as well as the crime of fleeing from
19 law enforcement.

20 Eight gets back to qualified immunity. That was also not
21 incorporated. Again, that is a question for the Court and not
22 the jury. Defendant's nine is not incorporated, dismissed at
23 summary judgment stage. Ten, not incorporated. Again,
24 immunity is largely a question for the Court to decide, and
25 given the intentional affliction of emotional distress claim

has been dismissed at this point, the state immunity issue is not relevant. Defendant's 11 has been incorporated in part in the Court's proposed charge. Defendant's 12 has not been; it's the intentional infliction claim, again, the Court has dismissed.

Defendant's 13 has been incorporated in part, as it deals with damages.

Same with 14; it's a damages instruction, which is -- parts of it have been incorporated in the Court's proposed charge. Same applies to defendant's 15; parts have been adopted -- used and adopted.

16 has been incorporated, defendant's 16, with respect to the conscientious pain and suffering claim.

Defendant's proposed instruction 17 is rejected. The Court will instruct the jury on punitive damages obviously, but given the lack of any remaining state law claims, West Virginia Code 5729 is not applicable to any remaining damages consideration here. So defendant 17 is not given. Will not be given.

18, however, portions of it similar to plaintiff's mirror version, if you will, have been incorporated in the Court's charge.

I believe that covers everyone's proposed instructions. Are there any other instructions that were tendered to the Court that the Court didn't address at this point.

01:08:35 1 Mr. Umina.

01:08:37 2 MR. UMINA: Nothing from us, Your Honor.

01:08:39 3 THE COURT: Mr. Carroll.

01:08:40 4 MR. CARROLL: There were no instructions that were
01:08:42 5 tendered on behalf of the defendant that have not been
01:08:45 6 addressed.

01:08:46 7 THE COURT: With that, then, let's take a look at the
01:08:49 8 version the parties have, and everyone should have a line
01:08:51 9 numbered edition.

01:08:54 10 Mr. Umina, anything you want to address with respect to
01:08:57 11 the proposed instructions and the Court's use of those or with
01:09:02 12 respect to the charges currently constituted?

01:09:06 13 MR. UMINA: Your Honor, Mr. Hogan will speak to that.

01:09:09 14 THE COURT: I'm sorry, Mr. Hogan, sir.

01:09:10 15 MR. HOGAN: My only concern after looking over these
01:09:17 16 is on page 13. First, both are on page 13 as luck would have
01:09:24 17 it, first is on line three that if the plaintiff would
01:09:29 18 establish the claim of losses of Philip Rhoades, I would
01:09:31 19 suggest just for consistency purposes, to be consistent with
01:09:36 20 lines seven and eight on that same page, that it said that we
01:09:40 21 add, "And your verdict should be for the plaintiff, Christy
01:09:45 22 Rhoades," just as it is for Defendant Forsyth below.

01:09:48 23 THE COURT: So after, "by Philip Rhoades" on line
01:09:51 24 three your proposal would be to add, "And your verdict should
01:09:54 25 be for the plaintiff, Christy Rhoades?"

01:09:58 1 MR. HOGAN: Correct.

01:09:59 2 THE COURT: Any objection to that, Mr. Carroll?

01:10:02 3 MR. CARROLL: No, Your Honor.

01:10:03 4 THE COURT: We will do that. Thank you for that
01:10:05 5 consistency catch, Mr. Hogan.

01:10:07 6 SPEAKER: And then, Your Honor, the second thing that
01:10:10 7 we would have some concern on is the fleeing from police
01:10:15 8 officer instruction. First, the assessment of the officer's
01:10:21 9 use of force is, of course, assessed at the time the incident
01:10:25 10 occurred, and things that led up to it, just like the July
01:10:29 11 25th incident, for example, don't have any bearing on that.
01:10:32 12 What it made me think of is the comparative fault instruction
01:10:38 13 that was on the verdict form submitted by the defendant. And
01:10:41 14 there is no support on the law. I've done some fairly
01:10:44 15 extensive research on that for comparative law instruction in
01:10:47 16 a 1983 Constitution depravation case. And this made me think
01:10:53 17 of that. Nor has there been any evidence submitted or
01:10:55 18 presented that Philip Rhoades actually intentionally fled or
01:11:00 19 attempted to flee at the time of the incident. The only thing
01:11:01 20 that they proffered is that he tried to run him over with the
01:11:05 21 Jeep. And so, I would suggest that we strike the entire
01:11:11 22 fleeing from the police officer instruction because the
01:11:13 23 totality of the circumstances is already covered by the
01:11:16 24 Court's prior instructions leading up to that.

01:11:18 25 THE COURT: Understood. Thank you, sir.

01:11:24 1 Mr. Carroll, with respect to fleeing from a police
01:11:27 2 officer, which I believe is defendant's proposed
01:11:28 3 instruction --

01:11:40 4 MR. CARROLL: I believe it's number seven, Your
01:11:41 5 Honor.

01:11:41 6 THE COURT: It the last one I looked at, which I
01:11:44 7 believe is largely defendant's proposed number seven, which in
01:11:47 8 this version is on page 13, lines nine through 19.

01:11:53 9 MR. CARROLL: Yes, Your Honor. I do believe that the
01:11:55 10 evidence that has come out through trial includes that
01:11:59 11 Deputy Forsyth was responding to a vehicle pursuit. He did
01:12:01 12 identify the black Jeep driven by Philip Rhoades. He did
01:12:06 13 attempt to make a traffic stop, by putting his lights on, and
01:12:10 14 Philip Rhoades did not stop. And certainly all those
01:12:13 15 inferences could be drawn by a reasonable jury in this case.
01:12:16 16 I think it would be inconsistent with what is in the record
01:12:20 17 and the function of the pursuit that it was going on, to not
01:12:23 18 include an instruction such as this. And that also includes
01:12:26 19 the fact that part of the determination of the reasonableness
01:12:29 20 of Deputy Forsyth's actions is the severity of the crime at
01:12:35 21 issue. I mean, here if the plaintiff was committing a crime
01:12:37 22 or the facts could support that he was committing a crime,
01:12:40 23 that is something that should be considered by the jury, and
01:12:42 24 that is a matter of law that the jury should be instructed on.

01:12:45 25 THE COURT: Anything further on that Mr. Hogan, sir?

01:12:48 1 MR. HOGAN: Yes, Your Honor, just one quick thing.
01:12:50 2 *Tennessee vs. Garner* is the seminal case as it has been in
01:12:54 3 this specific case, right?

01:12:56 4 THE COURT: We heard about that earlier this morning.

01:12:59 5 MR. HOGAN: Right, and fleeing from an officer is, of
01:13:02 6 course, not grounds to deploy deadly force, and this
01:13:04 7 instruction suggests that it might be. And pursuing an
01:13:09 8 officer -- I mean, pursuing a defendant in a car chase is
01:13:14 9 under no circumstances grounds to deploy deadly force, and I
01:13:19 10 think that this invites a suggestion that it might be.

01:13:21 11 THE COURT: Understood. I will overrule the
01:13:25 12 objection, although I am going to revise this portion of the
01:13:30 13 Court's charge, in particular at line 17, after the comma
01:13:35 14 following Philip Rhoades to read -- so that entire sentence
01:13:39 15 will read, "You may consider the conduct of the decedent,
01:13:42 16 Philip Rhoades, as part of the totality of the circumstances
01:13:46 17 when determining whether the use of deadly force by the
01:13:49 18 defendant, David Forsyth, was reasonable." I think it's an
01:13:52 19 accurate statement of the law. There is evidence,
01:13:56 20 particularly radio traffic, indicating at least law
01:13:59 21 enforcement believed that Mr. Rhoades was fleeing, and there
01:14:03 22 has to be some explanation as to how these folks end up where
01:14:07 23 they end up. But I think it's an appropriate part of the
01:14:11 24 calculus of the totality of the circumstances.

01:14:14 25 I understand your point, Mr. Hogan, with respect to

1 concerns of creating almost an equivalency with comparative
2 fault analysis. That's why we are going to add, again, at the
3 end of line 17, after Mr. Rhoades' name, "As part of the
4 totality of the circumstances in determining whether the use
5 of deadly force by David Forsyth was reasonable." But
6 understood. Objection overruled, noted. But you have that
7 modification based on your objection. Anything else from the
8 plaintiff's perspective?

9 MR. HOGAN: Nothing further from us.

10 THE COURT: Thank you.

11 Mr. Carroll, sir.

12 MR. CARROLL: Thank you, Your Honor. Initially we
13 would certainly object to the exclusion of any or the failure
14 to include instructions on qualified immunity. And I
15 understand the Court has -- would prefer to address that in
16 the Rule 50 motion that I will be making.

17 THE COURT: We are going to talk about qualified
18 immunity at Rule 50 stage, but separate and apart from that
19 with respect to the defendant's request to instruct the jury
20 on qualified immunity, again, I did extensive research on that
21 yesterday, last night, and this morning, that there are very,
22 very limited circumstances where courts have submitted the
23 question of qualified immunity to a jury. And I don't think
24 any of those exist here. That is a question of law to be
25 decided by the Court. It is also quite clear that it's a

question that enables, as was done here upon denial of qualified immunity, an interlocutory appeal further highlighting the fact that it's a question of law that needs determined before a jury is impaneled and has to consider the factual disputes in the case.

I understand. I think that is a question more appropriate for the Court, as opposed to the jury. My efforts, research-wise anyway, to find a set of circumstances where a jury should be asked to make determinations with respect to qualified immunity are very, very, limited, and I don't -- certainly didn't find anything to indicate in this case that that was appropriate. On those particular instructions, sir, objection noted.

MR. CARROLL: Thank you, Your Honor. Just one moment, Your Honor.

THE COURT: Sure.

MR. CARROLL: Thank you, Your Honor. The next issue that I would like to address is with regards to nominal damages. That is on page 16, and I am specifically looking at line ten. This is the Court's instruction, Your Honor.

THE COURT: Okay. Go ahead.

MR. CARROLL: In that provision, I will just read from the beginning at eight, "If you return a verdict for the estate of Philip Jontz Rhoades, but the estate of Philip Jontz Rhoades failed to prove the compensatory damage, then you must

award nominal damages." And Your Honor, it seems from the case law from the Fourth Circuit, particularly *Ganey vs. Edwards*, it would be inappropriate to instruct the jury that they must award nominal damages, and whether they award a dollar or less, that remains within the sound discretion of the jury. I think that is evidence in the case law I don't see any reason that the Court would stray from that, do you?

THE COURT: I understand your argument. You need to update your research, *Farrar v. Hobby*, 506 US 103, while that case doesn't expressly overrule *Ganey*, subsequent Fourth Circuit cases have. The jury, if they do not award any compensatory damages, if there is a finding that a constitutional right has been infringed upon, they are required to award nominal damages, so for that reason that objection is overruled.

MR. CARROLL: And to that extent that is my mistake. I apologize for taking the Court's time on that.

The next issue I would like to address would be in the punitive damages portion, and that would be the same case page, lines 22 and 23. And particularly I would like to direct the Court's attention to the "motivated by evil" motive or intent provision. We did make a motion earlier to exclude punitive damages, and I may have misunderstood the Court at that time, but I understood that the Court denied that motion based off of reckless or callous indifference that could be

1 inferred from the record. To the extent that the Court would
2 agree that there is no evidence of evil motive or intent, I do
3 not think that the jury should be instructed on evil motive or
4 intent.

5 THE COURT: Understood. Objection overruled. I do
6 believe that is a correct statement of the law. Those are the
7 different buckets, if you will, different buckets of evidence
8 or categories of evidence, I should say, that would support a
9 finding and award of punitive damages in an excessive force
10 case. I am not overly convinced, but I think there is
11 certainly evidence in the record from which a jury can infer a
12 different basis than perhaps reckless or callous indifference.
13 For that reason, objection overruled.

14 Again, I do believe it is an accurate statement of the
15 law that is not -- does not present a risk of jury confusion
16 at this point.

17 MR. CARROLL: Understood, Your Honor. And I should
18 also add that it's that same motivated by evil motive or
19 intent that is presented on page 17, lines 9 and 10, I would
20 incorporate my objection to those lines as well.

21 THE COURT: Understood. So incorporated. Same
22 ruling.

23 MR. CARROLL: One further issue I would like to
24 address is instruction -- this one is in the punitive damages
25 section. I am referring to page 17 at line eight. I do

1 understand the Court's rulings from earlier, that now that
2 intentional emotional distress claim has been dismissed, the
3 West Virginia statute for punitive damages does not apply. It
4 seems to me, from my review of the law, that to the extent
5 that punitive damages was created by the case law, that the
6 substantive mechanism for punitive damages needs to be
7 borrowed from the state law and to that end, I believe that
8 punitive damages, even in this case, which is 1983 arising in
9 West Virginia, I think it would still be clear and convincing
10 evidence which is the standard in West Virginia.

11 THE COURT: Okay. Understood. Thank you, Mr.
12 Carroll.

13 Mr. Hogan.

14 MR. HOGAN: Your Honor, I think that given the
15 genesis of the punitive damages possibility is a 1983 case, I
16 don't know why we would draw from state law the clear and
17 convincing standard. I have admittedly, though, not done
18 extensive research in the past 45 minutes on this issue, but I
19 don't know that that would be our objection to -- that would
20 be our response to that objection.

21 THE COURT: I understand.

22 Mr. Carroll.

23 MR. CARROLL: I would like to add, in all candor to
24 the Court, I think it is a true statement that it is not
25 extensively litigated, the standard of law for punitive

01:21:18 1 damages in the 1983 claim. But in context such as the statute
01:21:23 2 of limitations which necessarily bars from state law, I
01:21:24 3 believe that would be the bulk of the issue from the federal
01:21:27 4 perspective. That's all I wanted to add, Your Honor.

01:21:29 5 THE COURT: Well, I read that statute. It's 55-7-29,
01:21:37 6 correct?

01:21:39 7 MS. DURST: Yes, Your Honor.

01:22:02 8 THE COURT: I understand the argument, Mr. Carroll.
01:22:04 9 I think I am inclined to agree with Mr. Hogan. We are talking
01:22:08 10 about a federal statutory cause of action as opposed to the
01:22:14 11 extent there could possibly -- to the extent that you are
01:22:16 12 talking about a federal common law cause of action, my very
01:22:21 13 poor legislative drafting skills don't make any distinction
01:22:29 14 between civil actions in federal court, state court, or the
01:22:34 15 like. I have, in all candor, concerns of the state
01:22:38 16 legislature telling us how damages can be considered, or
01:22:43 17 should be treated, in federal court, particularly under
01:22:47 18 federal statutes, and then what happens even within the Fourth
01:22:50 19 Circuit if there is a similar 1983 case within the
01:22:53 20 commonwealth of Virginia, in such that you are stuck with
01:22:57 21 differing evidentiary standards and factors are punitive. We
01:23:05 22 are not going to apply again my legislative handwork at
01:23:12 23 55-7-29 here. If we had an intentional infliction claim, I
01:23:15 24 think we would have a more complicated conversation right now
01:23:19 25 because obviously 55-7-29 would apply to that, so we would

01:23:24 1 have two lines of thinking on punitives. But I understand the
01:23:29 2 objection. It's overruled at this point.

01:23:31 3 Anything further on the charge, Mr. Carroll - -

01:23:34 4 MR. CARROLL: Nothing further on the charge, Your
01:23:35 5 Honor.

01:23:35 6 THE COURT: -- okay. Anything else from anybody with
01:23:38 7 respect to the Court's proposed charge?

01:23:40 8 MR. HOGAN: Nothing from the plaintiffs, Your Honor.

01:23:41 9 THE COURT: Mr. Carroll.

01:23:41 10 MR. CARROLL: With regards to the charge?

01:23:41 11 THE COURT: Yes.

01:23:44 12 MR. CARROLL: Nothing, Your Honor.

01:23:45 13 THE COURT: Okay. All right. We will revise it as
01:23:48 14 indicated. So that the counsel knows, our charge is not very
01:23:55 15 lengthy, so hopefully we don't run into court technology
01:24:00 16 issues. My usual course of action is everybody will have a
01:24:03 17 hard copy of the charge without the line numbers, including
01:24:06 18 the jurors, so they can read along as the Court instructs
01:24:10 19 them. Again, the charge here is not over lengthy, but some
01:24:18 20 folks process things better reading as opposed to listening,
01:24:21 21 so I would like to give folks the option. We will make
01:24:24 22 revisions as noted and hit "control P" and start printing.
01:24:30 23 That may take a few moments.

01:24:32 24 Let's talk about our verdict form. Mr. Hogan, Mr.
01:24:35 25 Carroll, you still have responsibility for that verdict form.

Any issues we need to take up from the plaintiff's perspective?

MR. HOGAN: Nothing from the plaintiffs, Your Honor.

THE COURT: Understood.

Mr. Carroll, anything on the verdict form?

MR. CARROLL: A few things to address. Again, I would like to place an objection on the record to not including the defendant's proposed qualified immunity provision. We think that is something the jury should be considering and believe it to be error not to do so.

THE COURT: Understood.

MR. CARROLL: Next issue I would like to address is on page 2 at line seven regarding a line item for damages.

THE COURT: Sure.

MR. CARROLL: And that line item would be pain and suffering of Philip's Jontz Rhoades. I believe that the testimony in this case from the medical examiner that death would have been essentially instantaneous, resulting in no pain and suffering from the decedent in this case, which means there would be nothing for the jury to consider.

THE COURT: Understood.

Mr. Hogan.

MR. HOGAN: Your Honor, the medical examiner explained that -- what he said was that the time of death does not necessarily mean that that is written in stone, but the

01:25:35 1 time of death is almost a half hour after the shooting
01:25:39 2 occurred. And even if one couldn't move one's lower
01:25:44 3 appendages, I can't imagine a greater amount of mental
01:25:49 4 anguish, and pain, and suffering laying in a field bleeding
01:25:53 5 out and knowing that it is the end of my life. So I think
01:25:56 6 that -- I think that is appropriate to keep there. And I
01:25:59 7 think that there is plenty of evidence for the jury to
01:26:01 8 consider.

01:26:02 9 THE COURT: Understood.

01:26:03 10 Mr. Carroll.

01:26:03 11 MR. CARROLL: First of all, Your Honor, I believe
01:26:06 12 plaintiffs just referred to mental anguish in that argument.

01:26:09 13 And that language is a separate line item, which is sort
01:26:11 14 of proving my point that we are duplicating damages here, but
01:26:14 15 I would also point out that I think that counsel is confusing
01:26:17 16 the time of death with the doctor's testimony on proposed --
01:26:23 17 not proposed -- pronounced death. So actual death occurs
01:26:31 18 being pronounced dead. The vital functions would have stopped
01:26:37 19 at the same time paralysis or inability to move --

01:26:41 20 THE COURT: Understood and I did take a look at the
01:26:42 21 medical examiner's testimony anticipating this issue. I think
01:26:46 22 there were kernels in there for everyone to use in Dr.
01:26:50 23 Savasman's testimony. There was testimony that there was a
01:26:53 24 chance at least that Mr. Rhoades was not immediately paralyzed
01:26:58 25 despite the partial severance of his spinal cord. I don't

1 think I would agree with Mr. Hogan's characterization that
2 there is a lot of evidence, but there is sufficient evidence
3 to submit that question to the jury. The jury will be
4 instructed on it, and it should also be included here. So
5 objection overruled on that for those reasons.

6 I will also note your objection with respect to the
7 requirement that the jury award nominal damages if they do not
8 award compensatory damages.

9 Anything further on the verdict form?

10 MR. CARROLL: Yes. I would like to make the record
11 here, Your Honor, the same arguments I made with regards to
12 the instructions. I appreciate the nominal damages issue that
13 you identified, but I also identify in terms of the next
14 paragraph down at line 22, "Preponderance of the evidence
15 standard;" that, again, I believe should be clear and
16 convincing evidence based on the punitive damages. And the
17 evil motive or intent, again, I believe that should be removed
18 as well.

19 THE COURT: Understood. With the same reasons the
20 Court articulated with respect to defendant's objections in
21 the instructions, we will leave that question on the verdict
22 form as it is.

23 Any other concerns or issues on the verdict form, Mr.
24 Carroll?

25 MR. CARROLL: Nothing further, Your Honor.

01:28:13 1 THE COURT: Yes, Mr. Umina.

01:28:14 2 MR. UMINA: Your Honor, we have made the decision,
01:28:18 3 the "loss of services to society, protection, care, and
01:28:21 4 assistance of Philip Rhoades," we would like to remove that
01:28:25 5 from the verdict form. We will not seek those damages, and we
01:28:28 6 would ask that defense counsel expressly not make my arguments
01:28:31 7 in this regard.

01:28:32 8 As it relates to family, we are solely going to be
01:28:34 9 arguing sorrow, mental anguish, and solace. We are not
01:28:38 10 arguing those damages.

01:28:39 11 THE COURT: Any objection to removing that line from
01:28:42 12 the verdict form?

01:28:43 13 MS. DURST: I don't have an objection to removing
01:28:44 14 that line from the verdict form, Your Honor. But I'm not
01:28:48 15 exactly sure what evidence they are asking that I not address
01:28:51 16 in my, you know, my closing argument based on the testimony
01:28:54 17 that the jury heard.

01:28:55 18 THE COURT: I mean the evidence is in. You can argue
01:28:58 19 on the evidence however you like. No objection striking lines
01:29:01 20 eight and nine on page 2 of the verdict form?

01:29:13 21 MS. DURST: No, Your Honor.

01:29:14 22 THE COURT: We will remove that.

01:29:16 23 MR. UMINA: Your Honor, what my concern is, you know,
01:29:20 24 they are going to stand up and argue he didn't, you know,
01:29:22 25 things about doctors appointments and all of these other sorts

of things. If those items aren't being sought, I am not sure how they can get up and make arguments about him not taking the kids to the doctors or anything like that. It would be -- I mean, it's nothing that the jury is going to consider. It would be irrelevant at that point.

THE COURT: The evidence is in, Mr. Umina. And frankly, I think those pieces of evidence that we heard about could arguably be considered relevant to the amount of sorrow, mental anguish, and solace that we are talking about --

MR. UMINA: We would --

THE COURT: -- relationship and I think that is a relevant consideration.

MR. UMINA: Well, then we would withdraw our removal of that from the verdict, Your Honor.

THE COURT: So you would like to keep "loss of services to society, protection, care and assistance of Philip Jontz Rhoades" on the verdict form?

MR. UMINA: Yes, Your Honor. I apologize.

THE COURT: All right. Any objection to that remaining on the verdict form?

MS. DURST: No, Your Honor.

THE COURT: All right. So we will leave lines 8 and 9 on page 2 of the Court's proposed verdict form. Anything else with regard to the verdict form, Mr. Umina?

MR. UMINA: Nothing further.

01:30:36 1 THE COURT: Mr. Carroll, Ms. Durst?

01:30:36 2 MR. CARROLL: No, Your Honor.

01:30:37 3 THE COURT: We will make the Court's copies exhibits.
01:30:45 4 We are right on schedule.

01:30:47 5 Here will be my plan. We will have the jury come back
01:30:50 6 in. I will advise them the defendant has rested, and they
01:30:54 7 have now heard all of the evidence. And then as -- maybe what
01:31:01 8 we will do is we will wait to make copies before we do that,
01:31:03 9 so that we can then proceed immediately to instructions. We
01:31:08 10 will take a break after instructions so that you guys can get
01:31:11 11 your thoughts together, get set up for closings, and then we
01:31:16 12 will have the jury back in for closings.

01:31:19 13 How long would counsel like for closing?

01:31:21 14 MR. UMINA: We anticipate approximately 40 minutes on
01:31:27 15 closing, and approximately 10 to 15 on rebuttal.

01:31:32 16 THE COURT: Understood.

01:31:33 17 Ms. Durst.

01:31:34 18 MS. DURST: Your Honor, I always underestimate
01:31:37 19 myself. I would probably indicate between 30 and 45 minutes.
01:31:41 20 I don't want to tell the Court 30, and then I know I am going
01:31:45 21 40 minutes.

01:31:45 22 THE COURT: There won't be a hard stop unless you go
01:31:48 23 crazy. Neither of those requested time frames offend me, so
01:31:50 24 we will go from there. Okay.

01:31:54 25 Anything else we need to take up at this point?

01:31:57 1 MR. CARROLL: Defendant would like to make a Rule 50

01:32:00 2 --

01:32:00 3 THE COURT: That's correct, Mr. Carroll. Go right
01:32:02 4 ahead.

01:32:03 5 MR. CARROLL: Now that the defendant has rested its
01:32:05 6 case, Your Honor, we are making a Rule 50 motion for judgment
01:32:07 7 as a matter of law under qualified immunity. A deputy's
01:32:10 8 actions are shielded so long as his actions do not contravene
01:32:15 9 a fairly established right of which a reasonable officer would
01:32:17 10 have known that * comes from law agree versus tow bell. This
01:32:22 11 is especially true in the context of street level police work,
01:32:24 12 which is what we are dealing with here. That was established
01:32:26 13 in *Rolling versus Perry* (phonetic). An officer should be
01:32:29 14 permitted to act without judicial second guessing, if they are
01:32:33 15 involved in an intense and highly fluid situation. That is
01:32:36 16 *Swanson vs. Powers* (phonetic).

01:32:37 17 The facts that the jury heard in this case, we have a
01:32:41 18 tense, evolving situation. I don't think that there is any
01:32:43 19 dispute to that. That this occurred during a high risk
01:32:47 20 traffic stop. Only 16 seconds for the defendant to reasonably
01:32:50 21 react to the situation. The deputy heard that Philip Rhoades
01:32:57 22 was armed over the radio, may be armed over the radio, excuse
01:33:01 23 me. At the time that the shooting occurred, we heard the
01:33:06 24 testimony that Deputy Forsyth believed that the Jeep was
01:33:10 25 coming at him. He had fear for himself. He had fear for his

01:33:13 1 partner. He did not know where he was, and believed he could
01:33:15 2 have been behind him. And we also know that another driver
01:33:18 3 was on the road nearby in the seconds or minute leading up to
01:33:24 4 this incident.

01:33:24 5 There is no argument that a vehicle can be used as a
01:33:26 6 weapon, and indeed this Court, I'm sure, is very familiar with
01:33:29 7 the (indiscernible) question in this case after discussing it
01:33:32 8 several times.

01:33:32 9 We have plaintiff's expert opinions, and we talked about
01:33:36 10 those earlier, but the plaintiff's expert relies on the
01:33:38 11 alleged physical evidence being inconsistent with the
01:33:40 12 defendant's statement, and that the timeline that their expert
01:33:45 13 created is inconsistent with the defendant's statement.

01:33:48 14 The court has now heard testimony from defendant's
01:33:51 15 expert, which specifically finds that Deputy Forsyth actions
01:33:54 16 were consistent within training or policies or consistent with
01:33:59 17 best police practices. Based on all the evidence the jury has
01:34:02 18 heard, a reasonable juror would have to conclude that the
01:34:05 19 actions of Deputy Forsyth were reasonable, and he is
01:34:07 20 therefore, shielded by qualified immunity.

01:34:11 21 THE COURT: Thank you very much. The Court will deny
01:34:12 22 the motion, similar to our discussion at the summary judgment
01:34:18 23 stage. I think there are factual disputes in this case that
01:34:22 24 precluded this Court from granting summary judgment on
01:34:26 25 qualified immunity grounds. And I am even more convinced of

01:34:30 1 that after listening to the testimony over the last three
01:34:34 2 days. In particular experts -- two experts' varying opinions,
01:34:38 3 I still I believe under the Rule 50 standard that there is
01:34:44 4 legally sufficient evidence should those factual disputes be
01:34:48 5 resolved in favor of the plaintiff that would render the
01:34:53 6 application of qualified immunity here inappropriate and not
01:35:00 7 proper based on the record. I do think, based on all the
01:35:03 8 cases that you noted, Mr. Carroll, I think the right that we
01:35:07 9 are talking about is clearly established, but the question
01:35:11 10 here again centers around factual dispute with respect to the
01:35:16 11 other prong of the qualified immunity analysis. So for that
01:35:21 12 reason that motion will be denied at this point. Objection
01:35:24 13 noted. Anything further we need to take up at this point,
01:35:27 14 Mr. Carroll?

01:35:28 15 MR. CARROLL: Nothing further, Your Honor.

01:35:29 16 THE COURT: Mr. Umina.

01:35:30 17 MR. UMINA: Nothing from us, Your Honor.

01:35:31 18 THE COURT: Okay. We will hit "control P", so we
01:35:36 19 might be a couple minutes tardy, but we will get to work and
01:35:40 20 use all the printers we have at our disposal in our post
01:35:44 21 office here, and we will bring the jury in as soon as that is
01:35:49 22 ready. Everybody can be at ease for a few moments. We will
01:35:52 23 give you a heads up when we are ready to go.

01:35:55 24 We stand in recess until then. Thank you.

01:54:14 25 (Recess taken at this time 1:35 - 1:54.)

01:54:14 1 THE COURT: Mr. Umina, anything else we need to take
01:54:19 2 up at this point, sir?

01:54:19 3 MR. UMINA: No, Your Honor.

01:54:19 4 THE COURT: Ms. Durst, Mr. Carroll.

01:54:20 5 MS. DURST: I don't believe so, Your Honor. Were we
01:54:21 6 going to get a copy of the verdict forms too?

01:54:23 7 THE COURT: Sure.

01:54:24 8 MS. DURST: I didn't know, Your Honor. I thought I
01:54:25 9 understood that, but I wasn't sure.

01:54:40 10 (Jury returned to the courtroom, and the following
01:54:48 11 transpired in open court.)

01:55:37 12 THE COURT: Thank you, ladies and gentlemen. Please
01:55:38 13 be seated.

01:55:39 14 Ladies and gentlemen, the defendant has rested, and you
01:55:43 15 have now heard all of the evidence in this case. So -- well,
01:55:47 16 first let me say my apologies for being a few minutes behind
01:55:51 17 schedule, but we wanted to be ready to dive right into the
01:55:55 18 next phase of our trial once we brought you back into the
01:55:56 19 courtroom, given that both parties have rested and you have
01:55:59 20 heard all of the evidence.

01:56:00 21 So from a planning perspective, since you know we are now
01:56:03 22 ready to review the instructions of law, that I promised you
01:56:07 23 were forthcoming at the beginning of our jury selection
01:56:10 24 process back on Tuesday. After we do that, we are going to
01:56:14 25 take a break, and then you will hear closing arguments from

01:56:17 1 counsel. And after that, the case will be yours to begin your
01:56:22 2 deliberations.

01:56:23 3 Each of you should have a copy of the jury instructions
01:56:26 4 on your chair, so that, if you are like me and you can follow
01:56:31 5 along better reading as opposed to listening, you can follow
01:56:35 6 along. We are now going to go through these together. It
01:56:39 7 appears that everyone has a copy. Outstanding.

01:56:41 8 Now that you have heard all of the evidence in this case,
01:56:43 9 ladies and gentlemen, it is my duty to instruct you as to the
01:56:47 10 law applicable to this civil action. It is your duty as
01:56:51 11 jurors to follow the law as stated in this final charge and to
01:56:55 12 apply these rules of law to the facts as you find them from
01:56:58 13 the evidence in this case.

01:57:01 14 You must not single out one instruction alone as stating
01:57:04 15 the law, but must consider the instructions as a whole. Each
01:57:09 16 of you may take your copy of these instructions with you into
01:57:11 17 the jury room.

01:57:12 18 First, you must determine from the evidence what the
01:57:15 19 facts of this case are. And second, you must apply the rules
01:57:18 20 of law that I will give to you to those facts in order to
01:57:23 21 determine whether defendant David Forsyth deprived the
01:57:27 22 decedent, Philip Rhoades, a federal constitutional right while
01:57:31 23 acting "under color" of state law.

01:57:33 24 You should not concern yourself with the wisdom of any
01:57:36 25 rule of law stated by the Court. Your sworn duty as jurors is

1 to base your verdict only on the law in this final charge
2 without regard to your personal opinion as to what the law
3 should be. It is also part of your sworn duty to base your
4 verdict only on the evidence that has been admitted in this
5 case.

6 Our jury system depends on the willingness of each
7 individual juror to seek the truth from the evidence presented
8 at trial, and to arrive at a verdict by applying the rules of
9 law as provided in these instructions.

10 I have no right to tell you what facts have been
11 established by the evidence that you have heard in this case.
12 In turn, you have no right as jurors to make decisions as to
13 what the law is that applies to this trial.

14 You must perform your duty without any bias or prejudice
15 as to either party. Our system of law does not permit jurors
16 to be governed by sympathy, prejudice, or public opinion. The
17 parties and the public expect that you will carefully and
18 impartially consider all of the evidence in this case, follow
19 the law as stated in this final charge, and then reach a just
20 verdict regardless of the consequences.

21 You must decide this case as a civil action between
22 persons of equal standing and worth in the community. All
23 persons stand equal before the law, and are to be dealt with
24 as equals in a court of justice.

25 The burden is on the plaintiff in a civil action to prove

every essential element of her claims by a preponderance of the evidence. If the evidence should fail to establish any essential element on a particular claim by a preponderance of the evidence, or if the evidence is evenly balanced, then the plaintiff has failed to establish her burden of proof, and you should find for the defendant on that claim.

The phrase preponderance of the evidence has a simple meaning. It has to do with the weight of the evidence. For example, in an ordinary lawsuit, the plaintiff brings forth evidence to support their side, and the defendant then brings forth evidence to support its side. Each juror then weighs the evidence in his or her mind. If the plaintiff's evidence is more persuasive and outweighs the defendant's evidence, then we have a condition where the preponderance or weight is on the plaintiff's side, and you should find for the plaintiff.

However, if the plaintiff's evidence is not more persuasive and does not outweigh the defendant's evidence, or if the evidence is evenly balanced in the minds of the jury, then there is a preponderance of the evidence favoring the defendant.

In determining preponderance, the test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which side presents the more persuasive evidence when all evidence has been heard. You are

1 to judge the quality of the evidence. Quality may or may not
2 be consistent with quantity.

3 As I mentioned at the start of this trial, there are,
4 generally speaking, two types of evidence from which you, the
5 jury, may properly find the truth as to the facts of this
6 case. One is direct evidence, such as testimony of an
7 eyewitness. The other is indirect or circumstantial evidence,
8 proof of a chain of circumstances pointing to the existence or
9 non-existence of certain facts. As a general rule, the law
10 makes no distinction between direct and circumstantial
11 evidence, but simply requires that the jury find the facts in
12 accordance with the preponderance of all of the evidence in
13 the case, both direct and circumstantial.

14 Statements and arguments of attorneys are not evidence in
15 the case. While counsel may, during closing argument, state
16 his or her opinion as to what the amount of the verdict should
17 be, you are instructed that any dollar figures mentioned by
18 counsel do not constitute evidence, but merely represent
19 argument which you as the jury may disregard in your
20 deliberations. Likewise, objections to questions are not
21 evidence. Lawyers have an obligation to their clients to make
22 an objection when they believe evidence being offered is
23 improper under the rules of evidence. You should not be
24 influenced by the objection or by the Court's ruling on it.
25 If the objection is sustained, ignore the question. If it is

1 overruled, treat the answer like any other. If you are
2 instructed some evidence is received only for a limited
3 purpose, you must follow that instruction.

4 The evidence in this case consists of the sworn testimony
5 of the witnesses, regardless of who may have called them, all
6 exhibits received in evidence, regardless of who may have
7 produced them, and all facts that have been stipulated to by
8 the parties. Any evidence to which I had sustained an
9 objection during the course of the trial, and any evidence
10 that I ordered stricken from the record, must be entirely
11 disregarded by you in your deliberations. In addition,
12 anything that you may have seen or heard outside the courtroom
13 is not evidence and must be entirely disregarded by you. You
14 are to consider only the evidence in the case. But in your
15 consideration of that evidence, you are not limited to the
16 mere statements of the witnesses. In other words, you are not
17 limited solely to what you have seen and heard the witnesses
18 testify. Are you permitted to draw from the facts that you
19 find have been proven such reasonable inferences as you
20 justify in light of your experience.

21 An inference is a deduction or conclusion that reason and
22 common sense lead the jury to draw from the facts that have
23 been established and the evidence in this case.

24 You as jurors are the sole judges of the credibility of
25 the witnesses and the weight their testimony deserves. You

are not required to accept testimony even though the testimony is uncontradicted and the witness is not impeached. You should carefully consider each witness's intelligence, motive, state of mind, demeanor, and manner while on the witness stand. Consider also any relation each witness may bear to other either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection or failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from the innocent error or intentional falsehood.

In addition, the testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are inconsistent with his or her present testimony. As a general rule, earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of those

statements. If a witness is shown to have knowingly testified falsely concerning any material matter, or conducted himself or herself in a manner that indicated a propensity to lie, or involved some element of deceit or untruthfulness. You have the right to distrust the testimony of that witness and other particulars, and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

In this connection, the weight of the evidence is not necessarily determined by the number of witnesses testifying. Rather, you should consider all of the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence or believability.

You have heard from two -- you have heard expert witness in this case, from Dennis Root and Samuel Faulkner. As I mentioned, an expert witness is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence, or in reaching an independent decision on the facts.

In weighing the expert's testimony you may consider the expert's qualifications, his or her opinions, his or her reasons for testifying, as well as all the other considerations that ordinarily apply when you are deciding

whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept these witnesses' testimony merely because they are experts, nor should you substitute it for your own reason, judgment, and common sense.

The determination of the facts in this case rests solely with you. A witness, whether or not a party, may be discredited or impeached by contradictory evidence or by evidence that at other times the witness may have made statements that are inconsistent with the witness's testimony. If you believe a witness has been impeached, or if a witness has been shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony and all other particulars and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

I know some of you have taken notes during the course of this trial. Notes are only an aid to memory, and should not be given preference over your independent recollection of the facts. A juror who did not take notes should rely on his or her independent recollection of the proceedings and should not be influenced by the notes of other jurors. If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, your recollection should

control during your deliberations.

Pertinent to this case, federal law provides that the plaintiff, Christy J. Rhoades, in her capacity as administratrix and personal representative of the estate of Philip Jontz Rhoades, may recover damages if Defendant David Forsyth, acting "under color" of law, deprived Philip Jontz Rhoades of a right guaranteed by the Constitution. The right at stake here is the right to be free from the use of excessive force.

The parties had agreed that defendant David Forsyth acted "under color" of law. The only issue for you, therefore, is the issue of excessive force.

In the instant case the plaintiff claims that Philip Rhoades was subjected to excessive force by the Defendant, David Forsyth, when Defendant Forsyth shot Philip Rhoades. To determine whether the defendant, David Forsyth's, acts caused Philip Rhoades to suffer the loss of a constitutional right, you must determine whether the amount of force used in attempting to affect the arrest was that which an objective reasonable officer would have employed in effecting the arrest under similar circumstances.

The estate of Philip Jontz Rhoades must prove both of the following elements by preponderance of the evidence. First, that Defendant David Forsyth acted "under color" of state law and second, while acting "under color" of state law.

Defendant David Forsyth deprived Philip Rhoades of a federal constitutional right. Again, the first element has been stipulated to and does not require your attention. The second element of the estate of Philip Jontz Rhoades' claim is that Defendant David Forsyth deprived him of federal constitutional right. In the instant case, plaintiff claims that Philip Rhoades was subjected to excessive force by the Defendant, David Forsyth, when the Defendant, David Forsyth, used deadly force against Philip Rhoades.

To determine whether the Defendant, David Forsyth's, acts caused Philip Rhoades to suffer the loss of a constitutional right, you must determine whether the amount of force used in attempting to effect the arrest was that which a reasonable officer would have employed in effecting the arrest under similar circumstances. Whether or not the force used was excessive is an issue for you to decide on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied under the same circumstances disclosed in this case.

The test of reasonableness require careful attention to the facts and circumstances, including but not limited to whether Philip Rhoades posed an immediate threat to the safety of the officer or others, whether Philip Rhoades was actively resisting the arrest, and the severity of the injury to Philip Rhoades.

02:10:48 1 The reasonableness of a particular use of force must be
02:10:51 2 judged from the perspective of a reasonable officer on the
02:10:56 3 scene rather than with 20/20 vision of hindsight. With
02:11:00 4 respect to a claim of excessive force, the standard of
02:11:02 5 reasonableness at that moment applies. The reasonableness
02:11:07 6 inquiry is an objective one. The question is whether an
02:11:12 7 officer's actions are objectively reasonable in light of all
02:11:16 8 the facts and circumstances confronting Defendant Forsyth
02:11:19 9 without regard to Defendant Forsyth's underlying intent or
02:11:22 10 motivation. Evil intentions will not make a constitutional
02:11:27 11 violation out of an objectively reasonable use of force, and
02:11:30 12 good intentions will not make an unreasonable use of force
02:11:33 13 proper.

02:11:36 14 An officer may not use deadly force to prevent a suspect
02:11:38 15 from escaping; unless deadly force is necessary to prevent the
02:11:43 16 escape and the officer has probable cause to believe that the
02:11:47 17 suspect poses an immediate, significant threat of death or
02:11:51 18 serious physical injury to the officer or others.

02:11:55 19 Also, the officer must give the suspect a warning before
02:11:59 20 using deadly force if it is feasible under the circumstances
02:12:03 21 to give such a warning. Thus, the estate of Philip Jontz
02:12:08 22 Rhoades must prove by a preponderance of the evidence that
02:12:11 23 Defendant David Forsyth did not reasonably believe that Philip
02:12:15 24 Rhoades posed an immediate, significant threat of serious
02:12:18 25 physical injury to Defendant David Forsyth or others at the

02:12:22 1 time of utilizing deadly force.

02:12:27 2 If you find that the amount of force used was greater
02:12:30 3 than a reasonable person would have employed, the plaintiff
02:12:34 4 will have established a claim of loss of a federal right by
02:12:38 5 Philip Rhoades, and your verdict should be for the estate of
02:12:41 6 Philip Rhoades. If after considering all the evidence you
02:12:44 7 should find the amount of force used was not greater than a
02:12:47 8 reasonable person would have employed, the plaintiff will have
02:12:50 9 failed to establish the claim of a loss of a federal right of
02:12:53 10 Philip Rhoades, and your verdict should be for the Defendant,
02:12:58 11 David Forsyth.

02:12:58 12 There has been evidence presented in this case that the
02:13:01 13 decedent, Philip Rhoades, intentionally fled or attempted to
02:13:05 14 flee from law enforcement officers at the time of the
02:13:08 15 shooting. You are instructed that in West Virginia it is a
02:13:11 16 crime for any person to flee or attempt to flee in a vehicle
02:13:14 17 from law enforcement after officers have given a clear visual
02:13:17 18 or audible signal directing the person to stop. You may
02:13:21 19 consider the conduct of the decedent, Philip Rhoades, as part
02:13:25 20 of the totality of the circumstances when determining whether
02:13:27 21 the use of deadly force by the Defendant, David Forsyth, was
02:13:31 22 reasonable.

02:13:33 23 The estate of Philip Jontz Rhoades has brought a cause of
02:13:36 24 action or a lawsuit against Defendant Forsyth under West
02:13:39 25 Virginia wrongful death statute. In order to prove an action

of wrongful death, there must be the death of a person, and the death must be caused by such wrongful act, neglect, or default as would, if death had not ensued, had entitled the injured party to maintain such action to recover damages for such wrongful death. Therefore, to find in favor of the estate of Philip Jontz Rhoades on this claim, the estate of Philip Jontz Rhoades must prove that the death of Philip Rhoades was caused by a wrongful act, neglect, or default on the part of the Defendant, David Forsyth, as would if death had not ensued, had entitled Philip Rhoades to maintain such action to recover damages from the defendant.

If you find Defendant David Forsyth liable, then you must consider the issue of compensatory or "general damages." You must award the estate of Philip Jontz Rhoades an amount that will fairly compensate it for any injury actually sustained as a result of Defendant David Forsyth's conduct which in this case resulted in death.

The estate of Philip Jontz Rhoades has also brought a claim for the suffering of Philip Jontz Rhoades prior to death. In determining the damages which the estate of Philip Jontz Rhoades is entitled to recover in this case, you should award such sum of money as will fully compensate the estate of Philip Jontz Rhoades for the injuries and losses sustained as a proximate result of the death of Philip Rhoades.

Additionally, in determining damages, if any, for pain

and suffering on the part of Philip Jontz Rhoades, the estate of Philip Rhoades has the burden of proving the conscientious pain and suffering prior to death. Where death is instantaneous or where there is no evidence that Philip Rhoades consciously perceived pain and suffering, no damages from pain and suffer are allowed. The type of damages at issue here is termed general damages. There is not a precise monetary or money calculation that can be used to determine general damages or compensatory damages. General or compensatory damages are not restricted to actual loss of money. They cover both mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the plaintiff, that is to make it whole or where it was immediately prior to the death of Philip Rhoades.

The estate of Philip Jontz Rhoades claims the following items of damages: Physical harm to Philip Rhoades during and after the events at issue including ill health, physical pain, disability, disfigurement, discomfort, or death. In assessing such harm you should consider the nature and extent of the injury, and whether the injury is temporary or permanent. In this case, Philip Rhoades suffered death.

Mental harm and emotional distress suffered by Philip Rhoades including fear, humiliation and mental anguish from the time of being subjected to excessive force by a government actor until his death, and lastly, sorrow, mental

02:16:42 1 anguish, and solace, which may include society, companionship,
02:16:47 2 comfort, guidance, kindly offices and advice of Philip
02:16:51 3 Rhoades' family members, including his two sons, mother,
02:16:54 4 father, brothers and lawful spouse. If you return a verdict
02:17:00 5 for the estate of Philip Jontz Rhoades, but the estate of
02:17:04 6 Philip Jontz Rhoades has failed to prove compensatory or
02:17:07 7 general damages, then you just award nominal damages.

02:17:11 8 A person whose federal rights were violated is entitled
02:17:14 9 to the recognition of that violation even if he or she
02:17:18 10 suffered no actual injury. Nominal damages are designed to
02:17:22 11 acknowledge the depravation of a federal right even when no
02:17:27 12 actual injury occurred. However, if you find actual injury,
02:17:31 13 you must award compensatory damages, as I instructed you,
02:17:35 14 rather than nominal damages.

02:17:39 15 You are further instructed that plaintiff has made a
02:17:42 16 claim for punitive damages against defendant. Punitive
02:17:47 17 damages in civil rights actions are available where the
02:17:49 18 defendant's conduct is shown to be motivated by evil motive or
02:17:53 19 intent, or when it involve reckless or callous indifference to
02:17:57 20 the federally protected rights of others. The focus in
02:18:02 21 awarding punitive damages to the plaintiff is on the character
02:18:05 22 of the defendant's conduct, including whether it is of the
02:18:08 23 sort that calls for deterrence and punishment over and above
02:18:12 24 that provided by compensatory awards.

02:18:15 25 Punitive damages are designed to be a deterrent.

02:18:18 1 However, because punitive damages are designed to punish
02:18:23 2 egregious conduct, you are instructed that before you return a
02:18:27 3 verdict for punitive damages, plaintiffs must prove by a
02:18:29 4 preponderance of the evidence that Defendant David Forsyth was
02:18:32 5 motivated by an evil motive or intent, or Defendant David
02:18:36 6 Forsyth's conduct involved reckless or callous indifference to
02:18:41 7 the federally protected rights of Philip Jontz Rhoades.

02:18:45 8 As a general proposition, the purposes of punitive
02:18:48 9 damages are; one, to punish a wrongdoer for conduct that has
02:18:52 10 harmed another party; and two, to discourage the wrongdoer and
02:18:57 11 others from acting the same way in the future. Therefore,
02:18:59 12 punitive damages are damages that are awarded to punish and
02:19:04 13 deter wrongdoers. Punitive damages are in addition to damages
02:19:07 14 you award to compensate the party for injuries or losses.
02:19:12 15 Therefore, if you find from the evidence that the defendant;
02:19:14 16 committed a wrongful act, with actual malice toward Philip
02:19:19 17 Rhoades or acted with a conscientious, reckless, or outrageous
02:19:21 18 indifference to the health, safety, and welfare of others,
02:19:26 19 then you may award plaintiff punitive damages in an amount you
02:19:28 20 believe is sufficient to punish the defendant and to serve as
02:19:35 21 an example to prevent defendant and others from acting in a
02:19:45 22 similar way in the future.

02:19:47 23 Remember, you are not required to award punitive damages,
02:19:51 24 and any punitive damages that are awarded must be in addition
02:19:54 25 to damages which are necessary to compensate plaintiff for the

02:19:57 1 losses incurred from the death of Philip Rhoades, or any
02:20:01 2 nominal damages you may award.

02:20:04 3 There is no fixed formula to determine the amount of
02:20:06 4 punitive damages. If you decide to award punitive damages,
02:20:09 5 you should consider the following factors in determining the
02:20:12 6 amount of punitive damages; one, punitive damages should bear
02:20:18 7 a reasonable relationship to the harm that is likely to occur
02:20:21 8 from the defendant's conduct, as well as bear any reasonable
02:20:25 9 relationship to the harm that actually has occurred. In
02:20:28 10 assessing punitive damages, the jury should also consider the
02:20:33 11 reprehensibility, offensiveness, or repugnancy of defendant's
02:20:36 12 conduct in this case, and whether and or how often defendant
02:20:39 13 engaged in similar conduct in the past, whether the defendant
02:20:43 14 has been adequately punished through other means, and whether
02:20:46 15 defendant attempted to conceal or cover up their actions or
02:20:50 16 the harm caused by them.

02:20:53 17 The proportional relationship between the compensatory
02:20:57 18 damages awarded and the punitive damages awarded must be
02:21:00 19 reasonable, although there is no fixed formula by which to
02:21:04 20 guide you.

02:21:04 21 You may consider any or all of these factors and give
02:21:09 22 them such weight as you consider appropriate in this case,
02:21:11 23 should you find that punitive damages are appropriate. If you
02:21:15 24 find punitive damages to be appropriate, your award of
02:21:19 25 punitive damages must not be based passion or prejudice, but

rather, should be based upon all the evidence in this case, and your desire to arrive at a reasonable amount which you feel will adequately punish defendant's conduct in this case.

The fact that I have instructed you on the law of damages does not imply or suggest that the Court believes that any damages should be awarded. Whether or not such damages are due is for you, the jury, to decide. Instructions as to the measure of damages are only given for your guidance in the event that you should find in favor of the plaintiff from a preponderance of the evidence in this case.

The fact that the plaintiff may have suffered damages does not automatically create a presumption of liability on the part of the Defendant, David Forsyth, and does not necessarily give the plaintiff a right to recover from Defendant David Forsyth. It is the burden of plaintiff to prove by a preponderance of the evidence each item of damages claimed. If plaintiff's proof should fall to establish an essential element of any of the damages by a preponderance of the evidence, the plaintiff cannot recover on that particular claim for damages.

You are not permitted to award damages based on sympathy, speculation, or guesswork. Damages which are purely speculative cannot be recovered, but it is the uncertainty as to the fact of damages and not as to the amount of damages that is to be considered. Where it is certain that the

02:22:55 1 damages resulted from Defendant David Forsyth's actions, the
02:22:56 2 mere uncertainty as to the amount does not justify the jury
02:23:00 3 refusing recovery.

02:23:01 4 The plaintiff is not required to prove his or her damages
02:23:06 5 with mathematical exactitude or precision because it is not
02:23:11 6 always possible or even probable that a party can prove the
02:23:15 7 exact amount of his or her damages. When determining the
02:23:17 8 amount of damages, you are not to be concerned where the money
02:23:21 9 comes from to pay for a damage award or what will happen to
02:23:24 10 the money once it is awarded.

02:23:29 11 Your verdict in this case must represent the considered
02:23:32 12 judgment of each juror. In order to return a verdict it is
02:23:36 13 necessary that each juror agree thereto. Your verdict must be
02:23:40 14 unanimous. It is your duty as jurors to consult with one
02:23:46 15 another, and to deliberate with a view to reaching an
02:23:49 16 agreement if can you do so without violence to your individual
02:23:53 17 judgment. You must decide the case for yourself, but only
02:23:55 18 after an impartial consideration of the evidence in the case
02:24:00 19 with your fellow jurors.

02:24:00 20 In the course of your deliberation, do not hesitate to
02:24:00 21 examine your own view, and change your opinion if convinced it
02:24:08 22 is erroneous, but do not surrender your honest conviction as
02:24:12 23 to the weight or effect of evidence, solely because of the
02:24:15 24 opinion of your fellow jurors, or for the mere purpose of
02:24:18 25 returning a verdict.

Remember at all times that you are not partisans. You are judges; judges of the facts of this case. Your sole interest in serving as jurors in this case is to seek the truth from the evidence in this case.

Upon retiring to the jury room, you will need to select one of your members to serve as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson in court. In addition to your copy of instructions that we have been reviewing, a verdict form has also been prepared for your convenience, and a copy of this verdict form will be provided to you to take back into the jury room, but I do want to review that with you now.

There are a series of questions, with instructions after some of the questions: One, do you find that the plaintiff has proven by a preponderance of the evidence that the force used by Defendant David Forsyth toward Philip Jontz Rhoades on August 2, 2017, was excessive and objectively reasonable? Yes or no.

If your answer to question one is "yes," please proceed to question 1A. If your answer to question one is "no," then skip the remaining questions, sign and date the verdict form, and inform the COURT security officer that you have completed your deliberations.

Question 1A, if you find the plaintiff has proven general damages by a preponderance of the evidence, please specify the

amounts, if any, of the following damages. There are then three categories of general damages listed for your consideration. Those are "sorrow, mental anguish, and solace;" "pain and suffering of Philip Jontz Rhoades;" and lastly, "loss of services, society, protection, care and assistance of Philip Jontz Rhoades." Underneath those three lines is a line for a total amount.

If you award any general damages you may skip question 1B and proceed to question two. Question 1B asks or states if you do not award any general damages to plaintiff, you must award nominal damages. Please specify the amount of nominal damages that you award. Then there is a line for nominal damages.

Question two: Do you find the plaintiff has proven by a preponderance of the evidence that the Defendant, David Forsyth, was motivated by an evil motive or intent, or Defendant David Forsyth conduct involved reckless or callous indifference to the federally protected rights of Philip Jontz Rhoades? Yes or no.

If your answer to question two is "no," then skip question 2A, sign and date the verdict form, and inform the court security officer that you have completed your deliberations. If your answer to question two is "yes," please list an amount of punitive damages in response to question 2A.

02:27:29 1 Question 2A asks, if your answer to question two is
02:27:36 2 "yes," specify the amount of punitive damages below. And
02:27:39 3 there is a line provided there for punitive damages.

02:27:42 4 Lastly, there is a line for the date, which is today,
02:27:48 5 April 9, 2021 and a line for your jury foreperson to sign.

02:27:54 6 You will take this verdict form to the jury room and when
02:27:57 7 you have reached a unanimous agreement as to your verdict, you
02:28:01 8 will have your foreperson complete this form by answering the
02:28:06 9 question or questions under the written instructions on the
02:28:08 10 verdict form and then completing the form, stating the verdict
02:28:11 11 upon which you unanimously agreed. Your foreperson will then
02:28:17 12 sign and date the form, and the jury will return with your
02:28:19 13 verdict to the courtroom.

02:28:21 14 If you should desire to communicate with the Court at any
02:28:24 15 time, please write down your message or question, and pass the
02:28:28 16 note to the court security officer who will bring it to my
02:28:33 17 attention. We will then respond as promptly as possible in
02:28:35 18 writing. I caution you, however, with regard to any message
02:28:38 19 or question you might send, that you should not tell me how
02:28:43 20 you stand numerically or otherwise, on the issue or any aspect
02:28:47 21 of your deliberations.

02:28:51 22 Ladies and gentlemen, we have completed our jury
02:28:55 23 instructions. At this point, we are going to take a brief,
02:28:58 24 five-minutes break and excuse you to your jury room so that
02:29:05 25 counsel can set up for closing arguments. After that break,

we will return. Plaintiff will have the opportunity to present their closing argument first. The defendant will have an opportunity after that. And finally, the plaintiff will have a brief period of time for rebuttal. After those closing arguments, we will excuse you finally to your jury room to begin your deliberations.

So odds are this is the last time you will hear me say this: Please continue to refrain from discussing this case with anyone including any of your fellow jurors, or in small groups of fellow jurors, or anyone else. Also, please continue to refrain from any independent investigation with respect to this case or any of the issues raised in connection with this case.

With that, we will ask you to step aside for five minutes while we set up. We will be back for closing arguments here in five. Thank you.

(Jury excused, and the following transpired in open court.)

THE COURT: You may all be seated. Anything we need to discuss before closings, Mr. Umina?

MR. UMINA: No, Your Honor.

THE COURT: Ms. Durst.

MS. DURST: No, Your Honor.

THE COURT: You are all free to rearrange the courtroom however you believe most appropriate. We will give

02:30:19 1 you five to do that, and then we will come back and get
02:30:21 2 started. Thank you all.

02:31:13 3 (Break taken at this time 2:30 p.m. - 2:39 p.m.)

02:39:15 4 THE COURT: Do we have everyone we need? Okay.
02:39:19 5 Ready to go?

02:39:22 6 MR. UMINA: Yes, Your Honor.

02:39:22 7 MS. DURST: Yes, Your Honor.

02:39:24 8 THE COURT: May we have our jury then. Thank you.
02:39:24 9 (Jury returned to the courtroom, and the following
02:40:51 10 transpired in open court.)

02:40:51 11 THE COURT: Thank you all. Please be seated.

02:40:53 12 Mr. Umina, if you are ready to go, you may proceed, sir.

02:40:57 13 MR. UMINA: May it please the Court, counsel.

02:42:13 14 Ladies and gentlemen, the Jeep was not in gear. Philip
02:42:26 15 should still be here. Basic rules of policing, ladies and
02:42:34 16 gentlemen. Police officers must never violate the
02:42:42 17 Constitution of the United States of America. I know the
02:42:48 18 defendant told that you there were exceptions when he was on
02:42:51 19 the witness stand. But as you will see in your jury
02:42:55 20 instructions, as everyone knows, the Constitution of the
02:42:59 21 United States is infallible. It has been long before we were
02:43:06 22 a country of over 300 million citizens. Our founding fathers
02:43:13 23 had the foresight and the knowledge to know that human beings
02:43:18 24 are imperfect, and if we create a system of government, we
02:43:25 25 must be protected from that government. No one is ever

permitted to violate a citizen's constitutional rights, especially not a police officer. And along those lines, police officers may never violate their own department's policies. No government actor can violate a policy causing death of a citizen. And when they do, they are liable for the harm that they have caused. They are liable for the life that they have taken.

Now, Mr. Prince told you at the beginning of this case this is how far we have to get, the 51-yard line. Another way of saying that, okay, if I were to come over here, take this book right here that Mr. Prince has, open it exactly in half, if you flip one page in our favor based on the weight of the evidence, we prevail. You must find for the plaintiff.

The standard here is not beyond a reasonable doubt. It's merely what's more likely than not, based on the evidence presented to you here in this courtroom. Evidence that the Jeep was moving. None. They haven't put up a single piece of evidence to prove that that Jeep wasn't in neutral. You have the self serving statement of the defendant. You have Corey Love, who neither saw the shooting, didn't see the vehicle, the front end of it; he didn't see anything. He was trying to get around his own moving vehicle. That's it. That's what they are hoping you rely on, the defendant's statement.

Let's talk about the evidence that indicates that the

02:45:54 1 Jeep was not moving, not rapidly and aggressively accelerating
02:46:02 2 and causing him to fear for his life and thus utilizing deadly
02:46:07 3 force and taking a man's life, shooting him in the face. The
02:46:11 4 Jeep wasn't in gear. You heard every single person who took
02:46:18 5 that witness stand testify about this, tell you a standard
02:46:24 6 transmission vehicle cannot be running 52 minutes after the
02:46:32 7 dead driver is pulled out with no one to push on the gas or
02:46:39 8 the clutch. It's simply not how a manual transmission
02:46:43 9 operates. A manual transmission must be in neutral, even the
02:46:49 10 defendant told you that, to be running with nobody in it.
02:46:53 11 Otherwise, the engine stalls out.

02:46:59 12 Vehicles in neutral do not accelerate. The defendant's
02:47:04 13 version of events is that the vehicle revved its engine and
02:47:11 14 began aggressively accelerating -- I guess we take that to be
02:47:15 15 rapidly -- towards him. He said it went straight at him, did
02:47:20 16 not veer, stop, or slow down. He said that thing was coming
02:47:25 17 straight at him. Vehicles in neutral don't do that.

02:47:33 18 You heard even Mr. Faulkner testify, bullets do not stop
02:47:41 19 moving vehicles. And in this case, you have seen the pictures
02:47:44 20 and we are going to look at more of these pictures. Where
02:47:49 21 could the Jeep possibly have been coming from? And then on a
02:47:54 22 dime, in what, the length of one car after he goes from tire
02:47:59 23 spinning, rapidly accelerating, shooting a driver, it just
02:48:04 24 magically stops right there in its tracks.

02:48:08 25 The judge instructed you, we are relying on good old

02:48:16 1 fashion common sense. And common sense tells us that vehicles
02:48:20 2 don't just magically stop when you shoot the driver if they
02:48:24 3 are rapidly accelerating. Killing the driver does not stop a
02:48:33 4 moving vehicle.

02:48:38 5 Everyone at the scene has testified, no one ever touched
02:48:44 6 the gear shift after the killing. No one touched it. No one
02:48:49 7 could have possibly taken the vehicle out of gear and put it
02:48:54 8 into neutral. And further, if the Jeep would have still been
02:48:58 9 in gear as Philip was laying there dead, it would have kept
02:49:04 10 going. It wouldn't have stopped.

02:49:12 11 The defendant testified the Jeep was still running. He
02:49:17 12 testified it had to be in neutral to still be running. You
02:49:26 13 heard from the state medical examiner, deputy chief. He sat
02:49:32 14 right there and told you with the injury that Philip sustained
02:49:36 15 to his spinal cord, to his C1, instantaneously, he can't move
02:49:44 16 from the neck down. There is no question he couldn't have
02:49:47 17 done anything. His spinal cord had just been severed by the
02:49:53 18 defendant's bullet. He couldn't have done anything to take
02:49:59 19 that vehicle from here in first gear, to here in neutral.

02:50:09 20 The timeline of events. I was not surprised by Mr.
02:50:22 21 Faulkner's testimony. He has been retained by the defendant's
02:50:26 22 counsel's law firm 50 to 70 times. He works for them
02:50:32 23 constantly. He is always going to tell you what they want you
02:50:39 24 to believe. Every single time. And, in fact, every single
02:50:45 25 case he has ever worked on, he has had the exact same opinion

400-plus times. Folks, he wants you to ignore time, distance, and the events as the defendant stated. I mean, he even told me the defendant's version of events was a hypothesis when I showed him hard, physical evidence to indicate his story doesn't add up. It just -- it just doesn't connect in the mind. It's like if you go and put the puzzle together at the scene and take his statements and try to make the physical evidence fit, everything inside of us tells us it doesn't. It doesn't fit his story. And the time line of events, why do you think they were so concerned with it? Because it's very bad for them. It's very, very bad for them.

You saw that road. We are going to take a look at that road again. You can't whip down that road at 50-mile an hour, and based on the defendant's version of events when he told you someone is driving by, let's sit on that for a second. I don't know if any of you are familiar with that area. I take it that you are not, but you are talking about a gravel road in a very rural area, very rural. Its a gravel road. So it just so happens at the moment he is driving by, that another car is passing. Highly unlikely, but let's assume that it was. He had to stop, wait, turn around, and then come from a stop, and then start accelerating up the road, that 213 feet. The time has started, folks. It doesn't add up.

There is no physical evidence of ground disturbance. You can see on those pictures of the roadway leading up to the

02:53:09 1 scene, how soft the ground was. I don't think anyone disputes
02:53:13 2 that. Okay. You can see how soft the ground was that day.
02:53:17 3 You can see how wet the ground was. And just either way, if
02:53:24 4 this Jeep is spinning its tires to the point where it starts
02:53:30 5 rapidly accelerating, there is going to be evidence of that.
02:53:35 6 And they even tried to trick you with a picture. They tried
02:53:39 7 to trick you. They tried to insult your intelligence by
02:53:46 8 putting in a photo that could possibly be something like a
02:53:53 9 tire spinning, and they put that in evidence hoping that you
02:53:56 10 would latch on to it, that you would buy it. And then that
02:54:00 11 same witness, Lieutenant Branham -- I mean, we have to commend
02:54:04 12 him. He really came in here and tried to tell you the truth
02:54:08 13 the best that he could. And I have so much sympathy for him,
02:54:12 14 for being fed this story by the defendant and then not knowing
02:54:17 15 how a manual transmission works, and he was hoodwinked. He
02:54:23 16 bought that story. But Lieutenant Branham confirmed,
02:54:30 17 confirmed the photo that they tried to feed you during this
02:54:34 18 trial to show that the tires were spinning couldn't have been
02:54:38 19 caused by the Jeep. They were actually and completely the
02:54:42 20 wrong direction. Lieutenant Branham also told you three
02:54:50 21 times, three times, Corey Love is lying. In his sworn
02:54:59 22 deposition about this case, Corey Love lied. And it was stuff
02:55:08 23 he didn't even need to lie to you about. The gunshot residue
02:55:12 24 test, I mean, he could have just said, I never shot him. I
02:55:14 25 washed my hands. I didn't shoot the guy. But he lied.

02:55:18 1 Because from the moment this happened, he towed the company
02:55:24 2 line. You heard it. His dad is Forsyth's boss. Now, he
02:55:28 3 wanted to classify it as a higher ranking member of the police
02:55:34 4 department, but that's his boss. Okay. Corey Love's dad is
02:55:38 5 the defendant's boss. And when they took that young man, 25
02:55:45 6 at the time, and told him what to say and told him to tow the
02:55:51 7 company line, he did it. And then he sat there and lied under
02:55:56 8 oath. And, you know, two of the most important things that he
02:56:03 9 lied about, two of the most -- I mean, absolutely significant
02:56:07 10 things that he lied about; one, he says he didn't talk to the
02:56:12 11 defendant before this. He didn't try to plan to gave their
02:56:16 12 statements together. You saw it in black and white. Love
02:56:23 13 told Lieutenant Branham he wants to come in and give his
02:56:27 14 statement with the defendant. Similarly, and he also said, --
02:56:34 15 No, he was just called, the defendant set up the time, and
02:56:39 16 then he was called and told when to come in. Branham talked
02:56:43 17 to Love first, so that was another lie. And then the
02:56:50 18 defendant also told Lieutenant Branham he wanted to give his
02:56:56 19 statement with Love.

02:56:59 20 Now, our expert, Mr. Root, he will tell you -- he told
02:57:04 21 you -- he looked you straight in the face -- "I don't have an
02:57:07 22 issue with them waiting. I have an issue with them talking
02:57:12 23 before and wanting to give their statements together." Why
02:57:15 24 would someone lie about it, if they weren't covering something
02:57:19 25 up? This is what a coverup looks like, ladies and gentlemen.

02:57:24 1 You are seeing it. You are in federal court right now. This
02:57:27 2 is what a coverup by the government looks like. They control
02:57:30 3 all of the documents, all of the evidence, everything. And
02:57:36 4 but for catching them in their lies, this entire case would
02:57:42 5 have been filed away somewhere, rubber stamped. That would
02:57:47 6 have been the end of it. The defendant would have gotten away
02:57:50 7 with it.

02:57:53 8 This photo -- Mr. Faulkner, I mean, he wouldn't even give
02:58:01 9 up the stuff that he was -- he wouldn't give up anything.
02:58:06 10 Mr. Root sat up here, and he would agree. He would agree many
02:58:12 11 of her points had nothing to do with this case whatsoever. It
02:58:16 12 was designed as another thing to distract you in hopes that
02:58:19 13 you don't understand that the only issue in this case is
02:58:24 14 whether or not the Jeep was moving. If the Jeep was not in
02:58:30 15 gear, Philip should still be here. Okay. It is
02:58:34 16 unquestionable; both experts told you; everyone told you. If
02:58:39 17 that Jeep wasn't doing what he said it was, then this was
02:58:44 18 objectively unreasonable, then the defendant violated Philip's
02:58:49 19 constitutional rights when he took his life at the dead end of
02:58:54 20 a dirt road at a gas well site all alone on August 2, 2017.

02:59:02 21 Folks, common sense. You see where this grass is? You
02:59:07 22 see how it's standing straight up? Philip Rhoades made a
02:59:11 23 three-point turn that day, but it was before the defendant
02:59:14 24 ever got there. Folks, you saw how this road comes up. He is
02:59:20 25 hidden here. Okay. He ran. He made a mistake. We do not

02:59:27 1 deny that at all, but Philip Rhoades isn't on trial. The
02:59:33 2 defendant took that from him when he acted as judge, jury, and
02:59:39 3 executioner. Just like that, two kids fatherless, a father
02:59:45 4 without a son, a brother without his brother who he has grown
02:59:50 5 up with since a child. Just like that.

02:59:57 6 These -- anything over here, that is not in line with the
03:00:00 7 Jeep's wheels, folks. The defendant said he hopped out of the
03:00:03 8 vehicle here. This Jeep came straight at him. Jeeps don't
03:00:08 9 move side-to-side. They don't just jump. Look at that grass
03:00:12 10 right there. If someone just backed up or even drove over it
03:00:18 11 forward, especially rapidly accelerating, but I mean, how does
03:00:22 12 it go from rapidly accelerating right here to stopped right
03:00:26 13 here? Even if it rolled, you wouldn't have grass up in the
03:00:30 14 wheel wells. You wouldn't have this vegetation pressed
03:00:33 15 against the bumper. He did. He got out to this road. He
03:00:39 16 made a three-point turn, and he tucked himself right back in
03:00:43 17 here. He wasn't running at this moment. He was hiding.
03:00:51 18 Again, 28 years old. He did something -- you know, he made a
03:00:58 19 mistake. He ran from law enforcement. But folks, it's a lot
03:01:04 20 more common than you think. In many instances, it's a
03:01:10 21 misdemeanor. In many instances, fleeing is a misdemeanor
03:01:15 22 crime. A lot -- has anyone seen Dukes of Hazard? People run
03:01:19 23 out in the country sometimes. He wasn't in the middle of
03:01:22 24 Clarksburg, or Fairmont, or Buckhannon, or even Kingwood. He
03:01:26 25 was way out in the country. I mean, this is off of a gravel

03:01:31 1 road at a gas well site. He is at a gas well site, if that
03:01:35 2 tells you anything. This photo, this vegetation, there is no
03:01:45 3 way that Jeep did what the defendant said it was doing. Let's
03:01:51 4 look here. Again, you have -- this is a ditch line, folks.
03:01:57 5 This is a ditch line. Look at that grass. Look at this grass
03:02:02 6 up here. Look how far it's pressed against the bumper. Look
03:02:07 7 at all the grass back here. No way. And where is he coming
03:02:13 8 from? This is a bowl, folks. How does that thing go from
03:02:18 9 spinning tires, rapidly accelerating, and by the time he gets
03:02:25 10 off seven shots, dead in his tracks, stops, standing straight
03:02:35 11 up. There is no way.

03:02:40 12 The defendant's expert wants you to ignore your common
03:02:44 13 sense. He wants you to ignore the physical, unchangeable,
03:02:53 14 hard evidence in this case, because that's what he did when he
03:02:57 15 formed his opinion. He took his statement, ignored any
03:03:02 16 inconsistencies from Love, and came in and did what he was
03:03:06 17 paid to do, just like he did 50 to 70 other times for the
03:03:12 18 defendant's counsel's law firm. They are 10 to 20 percent of
03:03:17 19 his entire income, folks. 10 to 20 percent of his entire
03:03:22 20 income. Do you think he is going to give an answer that they
03:03:24 21 don't want? So much so that he just walked into court,
03:03:28 22 straight faced, looked at you all during a federal trial and
03:03:32 23 told you that physical evidence doesn't matter. He insulted
03:03:35 24 your intelligence, ladies and gentlemen. Each and every one
03:03:39 25 of you know that. The first thing you would look at at the

03:03:44 1 scene of a shooting or anything else, is for physical
03:03:48 2 evidence. The Jeep was in neutral, folks. First gear is up
03:04:00 3 here, okay. Anyone ever seen a manual transmission? This
03:04:03 4 is -- I will tell you this is demonstrative. This is not the
03:04:09 5 gear shift from the vehicle. I am showing you this so you see
03:04:11 6 the manual transmission, okay. First gear, up here, okay.
03:04:16 7 They are going to throw anything at the wall, any reason that
03:04:20 8 they can to try to get you to believe some other way that that
03:04:24 9 thing got into neutral; falling on it, after the defendant
03:04:28 10 shot him in the face. Ladies and gentlemen, falling is a
03:04:34 11 forward motion, that would push this forward. It would keep
03:04:38 12 it in gear. It would continue to advance. Getting into
03:04:45 13 neutral is a back motion, so he just happened to fall just --
03:04:51 14 I mean, it doesn't make sense. You are sitting in the car,
03:04:56 15 get shot in the right cheek, you are going to fall back. You
03:05:01 16 are not going to magically take a bullet to the right side of
03:05:05 17 your face and then happen to hit the gear shifter this way.
03:05:13 18 That is speculation, total speculation, that they are hoping
03:05:18 19 that you grasp on to. And look at the size here, okay. This
03:05:31 20 is a bowl. Those pictures that you just saw in the back, this
03:05:35 21 type, this hillside, this is a ditch line. He had nowhere to
03:05:40 22 be accelerating from in this story. Nowhere.

03:05:49 23 Look at this grass behind the Jeep. Does that look like
03:05:55 24 it just got ran over? Folks, he turned around. He couldn't
03:06:06 25 have -- that Jeep couldn't have been back any further than

right here. If he kicks that thing into gear, slams on the gas, and starts moving forward, that thing -- it's going to keep going. This is the -- okay. This is another demonstrative exhibit. Additionally, let's clear something up, okay. Let's clear something up right here. Mr. Faulkner wanted to state that Dennis Root went out there a few days ago and drew this. That is not where he got this information. This information came from a former state trooper who acted as a private investigator in the days and weeks following the shooting, okay. He went out days after the shooting and made this drawing. This wasn't something done yesterday. This drawing was done nearly four years ago. And this, both experts had when looking at the scene, okay. So again, that testimony by Mr. Faulkner, that was completely untrue. This was done by a state trooper days after this happened when he went out to look at the scene, and that's when the drawing was done.

They tried to trick you, here at trial. We are in a federal courthouse. The defendant is on trial for depriving someone's constitutional rights and taking his life, and they tried to trick you with this photo. If you recall, Sergeant Branham was on the witness stand, okay; first witness that you all heard from. First witness that you all heard from, Sergeant Branham. They took this photo, put it into evidence, made a comment about me not putting it into evidence, okay,

1 because they are trying to support their theory of tires
2 spinning, if you recall that. And then when we talked to
3 Sergeant Branham about it, and we talked about the scene, he
4 acknowledged the vehicle would have had to have been
5 perpendicular to where it is sitting to make marks like this.
6 This is a trick. They tried to fool you in the middle of a
7 federal trial, because they know all of the other physical
8 evidence in this case does not support their theory.

9 Let's look at it side-by-side, evidence that the Jeep was
10 moving, hard evidence. None. Evidence the Jeep was not
11 moving. Folks, that's all we have seen here. The Jeep was in
12 neutral. The defendant told you that the vehicle had to be in
13 neutral to be running, and it was running. Sam Faulkner told
14 you the vehicle had to be in neutral to be running, Dennis
15 Root told you, Lieutenant Branham told you he didn't know how
16 that type of vehicle worked, but he has since learned that it
17 could not have been in gear and it had to be in neutral, and
18 Corey Love told you the same thing. That vehicle was running.

19 State medical examiner. Philip was shot in the right
20 cheek, okay. Instantly not able to move his legs. Instantly
21 not able to move his arms. Instantly not able to move his
22 body below his neck. He is not able to shift the car into
23 neutral, ladies and gentlemen. Again, that is total
24 speculation because they are trying to come up with anything
25 that they can to convince you that the defendant didn't hop

03:10:54 1 out of his car without putting it in park and attempt to stop
03:10:59 2 someone who had fled with bullets, which is expressly
03:11:07 3 prohibited by the Constitution of the United States of
03:11:10 4 America.

03:11:11 5 Now, this is very important, okay. The direction of the
03:11:19 6 wound path with respect to this anatomic position, okay, right
03:11:24 7 to left, downward, front to back, okay. He was shot here.
03:11:32 8 And we're not going to put anyone through seeing that photo of
03:11:36 9 the entry wound, okay. He was shot right here. The bullet
03:11:41 10 got lodged in his C1 down here okay. So it had a downward
03:11:46 11 angle to it. The defendant is standing in the front of the
03:11:50 12 vehicle, all right. They want to tell you the story that he
03:11:55 13 is reaching into the floorboard and doing all of these things,
03:11:59 14 but the entry wound, and the trajectory, and where the bullet
03:12:02 15 got lodged, indicate that he was faced this way. He is
03:12:12 16 cowering, ducking cover. And when you look at how the body
03:12:16 17 is, I mean, standard anatomical position, your C1 is here,
03:12:21 18 cheek is here. For that bullet to go through his cheek and
03:12:27 19 hit his spinal cord, he has to be faced this way, ducking the
03:12:33 20 defendant's fire. He can't be faced this way. He can't be
03:12:37 21 faced this way. If he is faced this way, he gets shot in this
03:12:42 22 side. If he reaching down here, he gets shot on left side.
03:12:46 23 If he is standing up or ducking down to cover, he gets shot in
03:12:51 24 the face. So he either, one, was ducking cover, or two,
03:12:55 25 trying to exit the vehicle. That's the only explanation for

03:13:03 1 this. He was standing right in front of the Jeep. He got
03:13:07 2 shot right here. The bullet hits him in the spinal cord. You
03:13:12 3 don't get shot in the face and the bullet end up in your
03:13:16 4 spinal court unless your head is down. Right to left,
03:13:21 5 slightly front to back, downward. He was attempting to exit
03:13:26 6 the vehicle or he was taking cover from the defendant's
03:13:31 7 bullet. What we know he wasn't doing, he wasn't faced this
03:13:38 8 way; wasn't faced this way; he was faced towards the door. So
03:13:48 9 all this, he is reaching into the floor board, he is doing
03:13:53 10 this and that, no. That bullet is all the way back here. And
03:14:04 11 when it hit him in the C1, he couldn't do anything. Couldn't
03:14:11 12 do anything. And again, he is sitting like this. How does he
03:14:21 13 magically knock the gear shift out? He doesn't.

03:14:25 14 Again, ladies and gentlemen, the preponderance of the
03:14:35 15 evidence, what is more likely than not, okay. They can throw
03:14:41 16 out all of these theories that they have no evidence for
03:14:45 17 whatsoever, okay. None. Not a single piece of evidence.
03:14:49 18 They don't have a single piece of evidence to support any of
03:14:54 19 these speculative theories that they have. But when we look
03:14:58 20 at the objective facts, the physical evidence, which their own
03:15:02 21 expert tried to discount, it is clearly, clearly weighed
03:15:12 22 heavily, heavily in favor of the fact that the defendant
03:15:18 23 violated Philip's constitutional rights when he shot him in
03:15:25 24 the face.

03:15:29 25 The Jeep was not in gear, ladies and gentlemen. Philip

03:15:38 1 should still be here. Basic rules of policing that we have
03:15:45 2 talked about. Constitution of the United States of America,
03:15:50 3 Fourth Amendment, the government cannot take a man's life
03:16:02 4 without it being clearly established that he had that right.
03:16:08 5 In fact, the law is set up to show what the defendant can't
03:16:13 6 do, and he has a duty to know that law. And in his policies,
03:16:20 7 in the Marion County use of force policy, it makes all of this
03:16:25 8 very, very clear. Deputies of the Marion County Sheriff's
03:16:32 9 Departments are permitted to use lethal force when the
03:16:33 10 deputies reasonably believe that it is necessary to protect
03:16:38 11 themselves or others from what they believe to be an imminent
03:16:43 12 threat of serious bodily injury or death, okay. Seriously
03:16:51 13 bodily injury or death.

03:16:59 14 Madam Clerk, may I see Defendant's Exhibit 1?

03:17:09 15 Imminent threat, it's defined in their policy, That
03:17:16 16 threat which is about to happen, immediate, and perceived to
03:17:26 17 be unavoidable. Perceived to be unavoidable. That's what an
03:17:35 18 imminent threat is, okay. Thank you.

03:17:48 19 Now, they may want you to latch onto this, oh, they saw
03:17:55 20 someone else down the road, or whatever, okay. Doesn't
03:18:00 21 matter. Imminent threat. Perceived to be unavoidable. That
03:18:07 22 means the threat that they are responding to is right now.
03:18:12 23 It's going to happen unless they utilize deadly force. That
03:18:16 24 is the only time they are permitted to use deadly force. And
03:18:25 25 this -- these laws, what they do is they make them to be

aligned with constitutional requirements. That's why when you look at the prohibitions, and folks you are going to have that with you. It's going to go back there, and you are going to be able to look at this. You are going to be able to look right at this policy. Prohibitions, A deputy shall not discharge a firearm under the following circumstances -- this is *Tennessee v Garner*, right here -- to stop an individual on the mere suspicion of a crime because the individual runs away. Moving vehicle absent exigent circumstances. See, that's why he has to claim even if the vehicle was moving, but we know it wasn't, that he said exigent circumstances. That is why he used to buzz word up there. But folks, that Jeep wasn't moving. To stop an individual on mere suspicion of a crime, simply because the individual runs away. It is prohibited. That is where Dukes of Hazard has it wrong. You can't shoot at them for running. That is what *Tennessee v Garner* was all about. So you can't say, "Oh, well, I mean, he just ran. It's okay that he shot him. That's all right." No. It is expressly prohibited under the use of force policy and under the Constitution of the United States of America and the law of the United States Supreme Court. That's what *Tennessee vs. Garner* stands for. You can't shoot someone because they had run.

Again, he made a mistake. He is out in the country. He didn't stop when they tried to pull him over. He got away, he

03:20:19 1 thought. He is hiding at the gas well site and within seconds
03:20:26 2 he is dead. Seconds of visual location of him. The defendant
03:20:30 3 jumped out of his vehicle, doesn't even put it into park,
03:20:33 4 steps in front of it, fires seven shots. He broke the most
03:20:40 5 basic rules of policing, and the most cardinal rules of the
03:20:45 6 United States of America contained in the Constitution. They
03:20:52 7 are going to try everything that they can to take attention
03:20:57 8 off of that. But do not forget Philip Rhoades is not on
03:21:02 9 trial. The defendant is expressly not allowed to shoot him
03:21:07 10 because he ran, and if he did, then he is liable. That is
03:21:14 11 where this story comes from, folks. He has to claim the Jeep
03:21:18 12 is trying to run him over. He knows he is not allowed to do
03:21:21 13 it. It's in black and white. That is Supreme Court law.
03:21:24 14 That is what governs him, and it is written in his own policy.

03:21:32 15 Folks, we had to get to here, okay. All you are looking
03:21:38 16 at is, is it more likely than not that the Jeep was rapidly
03:21:42 17 accelerating and the defendant's bullets magically stopped it
03:21:45 18 and then somehow it got into neutral. Or is it more likely
03:21:50 19 than not that he pulled in the gas well site, got so excited
03:21:56 20 that he found the guy that just ran, that he jumped out of the
03:21:56 21 car without putting it into park, stood up and killed him.
03:22:00 22 Killed him for fleeing, in violation of his policy.

03:22:04 23 Folks, we just had to get to the 50-yard line. The Jeep
03:22:09 24 was in neutral. No one has one sliver of evidence, not one
03:22:16 25 single piece of evidence, and you are not supposed to

speculate, folks. You are supposed to take the evidence presented at trial, and then decide based on the evidence presented. Nothing else. The Jeep was still running 52 minutes after there was no one in it. There is no ground disturbance to support his theory or his story about tires spinning and engine revving and all of that. Corey didn't say anything about tires spinning. But the photographs show you everything that you need to show. Look at them closely.

The false testimony that you heard. Ladies and gentlemen, I don't know how you can trust a single word that Corey Love said in his deposition that would support the defendant's theory. I don't know how you can trust a single word of that. When he was caught in three straight-faced lies under oath. Three lies, in black and white. How can you trust a single word that he says?

And then Mr. Faulkner, he sat here and lied to your face. He has submitted that CV in countless cases. He filled out application for that very job. It didn't say one place on his reason for wanting to go there being 9-11, okay. If he would have gone and applied for that job in response to 9-11, of course he would have put that on his application. It's because he was caught in a lie, and you could see it, I mean, you judge the witness credibility. That man has testified hundreds of times, but you could see it; he was caught in a lie. Right here, right in front of you. And to say that you

took a job in response to one of the darkest days in our nation's history and most of our memory in recent years, and to try and taunt that, when it's a flat out lie, that man has no credibility. In addition to what we have already talked about, about all of his testimony.

And the timeline, ladies and gentlemen, the timeline is very bad for the defendants. Very, very, very, bad for the defendant. That's why they got so upset when we used very simple math based upon their testimony and the radio transmissions here at trial. And then so what did they do? They leave, they get their expert prepared. You saw how mad everyone was that he was using math to show that the defendant couldn't be telling the truth. Because it's very, very, very bad for their case.

Ladies and gentlemen, if you were to return a verdict in favor of the defendant because you are worried about his career, or him, or his status in the community, or the financial burden that an award to compensate for the death of a 28 year old father of two, might cause him, your verdict would be for the wrong reasons.

The only reason that you may find for the defendant in this case is if he did nothing wrong. And, ladies and gentlemen, everything that we have seen here shows you that he did something very wrong. He violated the Constitution of the United States of America. He violated Supreme Court precedent

1 that was contained within his own policies. He broke the
2 rules of policing.

3 Your job, ladies and gentlemen, is not forgiveness. Your
4 function here is judgment. Only God can forgive. Your
5 function here is judgment.

6 Let's look at the verdict form for a moment. We are
7 switching technology over, so it will just be a moment. But
8 when you fill out this verdict form, here's exactly what you
9 have to do, okay. You have to judge the defendant. That's
10 what he is here for. He is on trial today. So when you fill
11 out this verdict form, okay, do you find that the plaintiff
12 has proven by a preponderance of the evidence what's more
13 likely than not, that the force used by Defendant David
14 Forsyth toward Philip Jontz Rhoades on August 2, 2017, was
15 excessive and objectively unreasonable. The Jeep wasn't in
16 gear, ladies and gentlemen. The Jeep wasn't moving. And
17 that's the only question you have to answer. Everyone told
18 you, if the Jeep wasn't moving, then this was objectively
19 unreasonable, by his own policies.

20 Mr. Prince told you that the hardest decision that you
21 will have to make in this section is damages, okay. I am not
22 going to tell you what to put here, okay. This is for you to
23 decide. "Sorrow, mental anguish, and solace," okay. What is
24 a life worth to everyone who lost that person? And we will
25 talk a bit more about that in a moment. "Pain and suffering

of Philip Jontz Rhoades," okay. The last thing that he experienced in his life was either attempting to exit his vehicle, complying with the defendant if he gave commands, or simply ducking fire. And the very last moment of his life was a bullet going into his face and in violation of the Constitution of the United States of America. "Loss of services to society, protection, care and assistance of Philip Rhoades."

Talk a little bit more about that. At that point you skip nominal damages. Do you find that he was motivated by evil intent or that his conduct involved a reckless or callous indifference to the federally protected rights of Philip Rhoades? Yes. A reckless or callous indifference. He knew what he was allowed to do and what he was not allowed to do. It was in his policy. And by taking someone's life for fleeing, that is a reckless indifference to the constitutional rights of Philip Rhoades. *Tennessee v Garner*. You can't shoot him just because he had run. And again, this is a question that you will have to answer. Punitive damages are for two purposes; one, to punish the defendant. He has not been punished for this. And the Court told you and instructed you if there was an effort to conceal or cover up his actions, that is to be considered, ladies and gentlemen. And without question, what you have seen, and what has brought everyone here is a coverup. There is no question about it. This was a

coverup. He shot and killed the man in a vehicle in neutral and knew what he did was wrong, and he tried to cover it up.

Now, let's talk about the defendant's questions, okay. Why would the defendant ask Rick and Christy a single question if they didn't do anything wrong? Okay. Because what you have to understand, you first have to decide liability, meaning did he do something wrong? And then you look at this part, damages, the testimony that you heard from Rick and Christy, okay, that only related to damages. What was the loss suffered by his children? How has this affected them? What kind of effect has it had on Rick, his father? What kind of effect has it had on the family? All of those questions only have to do with damages. So if the defendant knew he didn't do anything wrong and truly believed that, why would they sit up here and try and make Rick or Philip or anyone in his family try to degrade their family, try to belittle them, pry into every little detail in their life. It's a desperate attempt to try to save money, okay. They are trying to devalue someone's life, based on where they live, separated from their children's mother. Now, I will tell you, a word that got thrown around a lot, almost like in a negative way, which really affected some of us over here, defendant's counsel kept using the word "trailer," like it was a bad word. She really emphasized that word. "Trailer, trailer."

Folks, myself, Mr. Hogan, Mr. Prince, we all spent some

or all of our childhoods living in a trailer. Mr. Hogan here, he was born in a trailer. And as I stand here today, each of the three of us, are ranked in the top two and a half percent of attorneys in the state of West Virginia.

MS. DURST: Your Honor, objection.

THE COURT: Sustained. Move on, Mr. Umina.

MR. UMINA: The next questions that they asked, you they asked about them being separated, okay. So is the life of a child whose parents are separated, okay, the life of their father, their father's life is worth less now? For every single kid who is out there who is not in a nuclear family, if their parent dies, is their parent's life worth less now?

Now, I was trying to -- I have been thinking about it for many years actually. I have been looking into this case since shortly after it happened because -- once we realized and got into the lawsuit, I thought for a lot of years, how do I talk to you about the loss of a father to a child? Okay. And I am going to tell you a story. A story about my own life. That is my dad --

MS. DURST: Your Honor, objection.

MR. UMINA: Your Honor, I am allowed to tell a story.

THE COURT: Based on the evidence in the case, Mr. Umina.

MR. UMINA: This is demonstrative, Your Honor.

03:37:32 1 THE COURT. Overruled. Get to the point.

03:37:34 2 MR. UMINA: So this is my dad, okay. This is me.

03:37:40 3 And this is the first fish I ever caught, okay. Now, I

03:37:46 4 remember this day very well. So I am -- my parents were

03:37:54 5 divorced. I am down at my dad's. At the time he is living

03:37:57 6 with one of his buddies from the Army down on the shores of

03:38:01 7 Alabama. Me and my little brother were there, and we were

03:38:04 8 fishing off of a little dock, and I remember I was so excited,

03:38:09 9 you know. I saw the pole hit. I started yelling for my dad,

03:38:13 10 "Daddy, daddy," I was probably only about five years old,

03:38:18 11 okay. He comes over, and we reel this fish in, and I was so

03:38:24 12 excited. I kept telling him, "I caught dinner, I caught

03:38:28 13 dinner, daddy." I was so excited. And we go to the store,

03:38:33 14 grab a few things, go home. I vividly remember seeing the

03:38:38 15 fish frying in the pan. And before that, we had gone out in

03:38:42 16 the yard and --

03:38:43 17 MS. DURST: Your Honor, objection. I don't know what

03:38:45 18 this story is about, and how his father relates to the

03:38:49 19 evidence in this case.

03:38:50 20 MR. UMINA: Your Honor, if I may.

03:38:52 21 THE COURT: Wrap it up. Overruled. Get to the

03:38:55 22 point. Second time. Last warning.

03:38:58 23 MR. UMINA: The point I am getting to, okay, ladies

03:39:02 24 and gentlemen, is these memories, okay. Your Honor, I would

03:39:14 25 really like to finish this example.

03:39:18 1 THE COURT: It's not based on the evidence, sir, so
03:39:20 2 it's not subject to proper closing argument. Let's move on.

03:39:24 3 MR. UMINA: Okay. Folks, what they took from those
03:39:29 4 two little boys at the age of seven and nine, were their
03:39:35 5 memories, okay, memories of a father. They will never, ever,
03:39:44 6 ever be able to create those. For the rest of their lives,
03:39:53 7 every single time they would want to pick up the phone and
03:39:59 8 call their daddy, ask for advice, or just to be a father, at
03:40:08 9 the ages of seven and nine, that was taken away from them.

03:40:14 10 And Rick Rhoades, it's every parent's worse nightmare and
03:40:23 11 greatest fear to lose a child. Anyone with kids knows that.
03:40:31 12 You would give your life for your child. But Rick Rhoades had
03:40:38 13 to bury his son.

03:40:45 14 Did his son make a mistake? He did, okay. But he
03:40:52 15 doesn't deserve to die. And the law specifically prohibited
03:40:56 16 the defendant from taking his life.

03:41:02 17 Ladies and gentlemen, I couldn't begin to tell you how to
03:41:07 18 value that, but because of the mistake that a 28 year old
03:41:12 19 made, on one day in August of 2017, his life isn't worth
03:41:20 20 nothing. His life isn't meaningless. He was 28 years old.
03:41:25 21 He made a mistake. And the defendant violated the
03:41:30 22 Constitution of the United States of America and his own
03:41:33 23 policies when he took Philip's life.

03:41:39 24 You know, I saw this quote yesterday, yesterday, and it
03:41:46 25 just seemed so poignant for what brings us all here today.

03:41:53 1 This happened in 2017, okay. After the investigation, the
03:42:00 2 case was filed in 2018; it has taken nearly four years to get
03:42:09 3 here to this moment in front of each and every one of you to
03:42:16 4 tell you this story.

03:42:22 5 Ladies and gentlemen, the Jeep was not in gear, okay.
03:42:31 6 The Jeep was not in gear. Philip should still be here.

03:42:41 7 Thank you.

03:42:46 8 THE COURT: Thank you, Mr. Umina.

03:42:47 9 It strikes me, ladies and gentlemen, that we should
03:42:50 10 probably take a ten-minute personal comfort break at this
03:42:55 11 point, so we will do that, which makes me go back on my word
03:42:59 12 that this would be the last time you heard me say this.
03:43:01 13 Please continue at this point to refrain from discussing the
03:43:05 14 case with anyone including amongst yourselves or in small
03:43:07 15 groups and anyone outside the jury. Also, please continue to
03:43:10 16 refrain from any personal investigation efforts or independent
03:43:13 17 investigation efforts about this case or any issues related to
03:43:16 18 this case. But with that said, we will take a ten minute
03:43:19 19 break, and we will resume for defendant's closing argument.
03:43:22 20 Thank you very much.

03:43:22 21 (Jury left the courtroom, and the following transpired in
03:43:45 22 open court.)

03:43:45 23 THE COURT: Thank you all. We will see you in few
03:43:47 24 moments. Thank you.

03:43:47 25 (Break taken at this time 3:45 p.m. - 3:53 p.m.)

03:43:47 1 (The Jury entered the courtroom, and the following
03:53:32 2 transpired in open court.)

03:53:32 3 THE COURT: Thank you very much, ladies and
03:53:33 4 gentlemen. Please be seated everyone.

03:53:34 5 Ms. Durst.

03:53:35 6 MS. DURST: Thank you, Your Honor.

03:53:51 7 May it please the Court, counsel.

03:53:53 8 Ladies and gentlemen of the jury, I want to thank you
03:53:57 9 again for serving here this week. I know it's probably lasted
03:54:04 10 a little bit longer than we initially anticipated at the
03:54:07 11 beginning, but without jurors like you the plaintiff can't
03:54:12 12 file suit. My client can't have someone decide, you know,
03:54:17 13 whether his actions make him responsible for the plaintiff's
03:54:21 14 claim in this case so for that, I thank you. Thanks for the
03:54:25 15 attentiveness that you have shown. I will tell you I have
03:54:29 16 been in trials where I have seen jurors nod off, and that
03:54:33 17 always makes the attorney who is presenting the case worry.
03:54:36 18 So again, I appreciate that.

03:54:38 19 I also want to reiterate that I do have the pleasure and
03:54:42 20 the honor of representing Defendant David Forsyth in this
03:54:46 21 case. Regardless of the accusations that have been leveled
03:54:51 22 against him in this case, I welcome the opportunity to
03:54:57 23 represent him.

03:55:02 24 As the Court has instructed you, this case is supposed to
03:55:06 25 be decided on the evidence that you have heard in the

1 courtroom here today, well, throughout the week. But I feel
2 compelled, ladies and gentlemen, to respond to a comment that
3 was made in plaintiff's counsel's closing argument with regard
4 to any references to a trailer, implying that I somehow look
5 down upon or think poorly or badly of someone who lives in a
6 trailer. Rest assured, I do not. And that is very offensive
7 to me because I too, grew up in a trailer. So to the extent,
8 ladies and gentlemen, that there was some kind of implication
9 of questions that I asked during the course of this trial that
10 could somehow be cast negatively upon my client, I wanted to
11 make sure that I clarified that at this point in time.

12 Can we turn the monitor on, Madam Clerk?

13 This case, ladies and gentlemen, is a case about a
14 situation where David Forsyth had to make a split-second
15 decision to take action to protect himself, and what he
16 thought was potentially protecting Deputy Corey Love, because
17 he didn't know where Corey Love was at the time.

18 This is testimony from Dennis Root's deposition, and I
19 asked him this very same question on the witness stand, so you
20 heard his answer. He would train any officer that he is
21 providing training for that hesitation will get you killed.

22 So what are we talking about, ladies and gentlemen? You
23 have heard time and distance computations; you have heard 16
24 seconds; you have heard the radio traffic in this case. What
25 I want to do is to remind you of a couple of the time -- or a

couple of entries from the radio traffic, and you are going to have those to take back with you. If you recall, we walked Deputy Forsyth through what was occurring over the radio. Let's go ahead and play the first, please. And this, ladies and gentlemen, is at 2:43:04 or 1443:04.

(Playing audio in open court.)

MS. DURST: Let's play that one more time, Mr. Carroll.

(Playing audio in open court.)

Q. Let me stop here for one second. This is at 2:43:04, which is kind of the start of the 16 seconds that Mr. Root spent hours telling you about. He wants to take this entry and tell you that at that point in time Deputy David Forsyth was at the mouth of that bowl and that's -- or at the beginning of the access road, and that's where the 16 seconds starts.

What Mr. Faulkner has tried to convey to you here today is that there is no way to know exactly where Deputy Forsyth was on the access road, or where he was when he made that transmission. That's what Mr. Faulkner has tried to tell you, is we know the transmission was made. We know the time that it was made. We don't know the precise location of Deputy Forsyth 's cruiser when the transmission was made. But Mr. Root wants to take that transmission, and say that is the start of the 16 seconds, and then he had to travel down that

03:59:22 1 access road 212 feet. We have no idea. Deputy Forsyth
03:59:28 2 couldn't tell you exactly. And you heard Mr. Faulkner, when I
03:59:33 3 asked him the question, a gentleman, by the way who has
03:59:37 4 30 years in law enforcement who trains the trainers.
03:59:41 5 Deputy Forsyth attended the state police academy. Mr.
03:59:45 6 Forsyth -- or Mr. Faulkner trains those people that train our
03:59:49 7 cadets at the West Virginia State Police Academy. And what he
03:59:53 8 told you was if you are a police officer traveling down that
03:59:57 9 road in a high risk pursuit, you are not going to be looking
04:00:05 10 at your speedometer. How fast am I going? Am I going too
04:00:09 11 fast? You are not going to be looking at exactly where a
04:00:13 12 vehicle is to give a precise measurement the day of or a
04:00:20 13 couple days after a stress-inducing event like a shooting
04:00:25 14 situation where he had no choice but to take the life of
04:00:30 15 another person to protect himself.

04:00:32 16 So we have this entry at 2:43:04 that we know at a
04:00:38 17 minimum Deputy Forsyth was in that area, because he said he
04:00:43 18 thought Mr. Rhoades' Jeep had cut down an access road.

04:00:51 19 (Playing audio in open court.)

04:00:54 20 I think one thing you can also tell, ladies and
04:00:56 21 gentlemen, you have the radio traffic.

04:00:58 22 Let's play that again, please.

04:00:51 23 (Playing audio in open court.)

04:01:03 24 When you listen to the other recordings where
04:01:06 25 Deputy Forsyth is reporting what is happening, listen to the

04:01:11 1 change in his voice. Clearly that is, as has been conceded by
04:01:18 2 Mr. Root, as described by Mr. Faulkner, as testified to by
04:01:23 3 Deputy Forsyth, that is a stress-inducing, rapid evolving
04:01:28 4 event that a police officer is facing with, I think
04:01:34 5 Mr. Faulkner said a 4,400 pound vehicle coming at you, and at
04:01:38 6 that point in time remember what Deputy Forsyth heard over the
04:01:44 7 radio was Mr. Rhoades may be armed. We don't look at this
04:01:50 8 case -- and the Judge gave you the instructions, and Mr. Root
04:01:54 9 even conceded -- you don't look at this case in hindsight. We
04:01:58 10 don't Monday morning quarterback a police officer. But that
04:02:02 11 is exactly what Dennis Root has tried do in this courtroom.
04:02:06 12 He went in and said, "Well, there was a ditch on this side,
04:02:09 13 and a steep embankment here, and a hill down" --
04:02:13 14 Deputy Forsyth did not know any of that information when he
04:02:18 15 pulled into that gas well site, but Mr. Root is trying to
04:02:23 16 Monday morning quarterback what actions Deputy Forsyth took,
04:02:28 17 even though he paid lip service and repeatedly said, "Well, I
04:02:32 18 look at it in the light most favorable to the police officer."
04:02:37 19 What a load of crap. There is absolutely no way he looked at
04:02:42 20 this fact, the facts of this case, in the light most favorable
04:02:45 21 to the police officer.

04:02:47 22 So we know -- and what did Mr. Faulkner tell you -- we
04:02:52 23 know certain things. We know the timing of the transmissions.
04:02:55 24 We know generally even the area where Mr. -- Deputy Forsyth
04:02:59 25 would have been at the time he said, "Marion, shots fired,

shots fired," and that's how his voice was. He would have been in that area where the Jeep and the cruiser would have been. We don't even know exactly where he would have been positioned when he made that transmission, but we know 16 seconds elapsed between when he said, "Cut up the trail" and when he said "Shots were fired." It's easy for me to stand here and say, well, 16 seconds.

As the Judge kind of described to you when he was reading the jury charge -- I followed along because I do better like visually if I can put something in context -- I tried to figure out how can I convey to you to understand how short a period of time 16 seconds would have been for Deputy Forsyth to take the actions that he did, facing a Jeep coming at him with a suspect at that time he believed to be armed. So how can I show you what you can do or what little can be done in that 16 seconds? And you bounce ideas off. Mr. Carroll and I, we tried to figure that out. Here is what I have been able to figure out. I tried saying the Pledge of Allegiance. That's a little bit short of 16 seconds. Let me tell you what I have figured out, and I have a timer here on my own, ladies and gentlemen, that I am going to set for 16 seconds, and if you -- I am not going to sing the alphabet for you, because I can't sing, but saying the alphabet is 16 seconds, and that is the amount of time that Deputy Forsyth had to make this decision. I am getting ready to start the timer. A, B, C, D,

04:04:57 1 E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y,
04:05:09 2 and Z. 16 seconds, ladies and gentlemen. That is what -- the
04:05:17 3 amount of time that Deputy Forsyth had from time -- at
04:05:20 4 whatever point in time he was going down that access road to
04:05:25 5 make a decision to protect himself. 16 seconds.

04:05:35 6 This is also from Mr. Root's testimony. This is an
04:05:39 7 excerpt taken from his deposition, but I know he said it on
04:05:44 8 the witness stand because I asked him the same question:
04:05:46 9 "Would you agree with me that when dealing with a suspect
04:05:49 10 armed with a deadly weapon, fractions of a second can make the
04:05:53 11 difference between going home at the end of police officer's
04:05:56 12 shift, and having a law enforcement officer's funeral?"

04:06:02 13 "A hundred percent."

04:06:04 14 Flip to the next slide, please. I asked Mr. Root also:
04:06:08 15 "Would you agree with me also in terms of a deadly weapon,
04:06:13 16 that a vehicle can be a deadly weapon?" And his answer was
04:06:17 17 "Yes." And we know a vehicle can be a deadly weapon, ladies
04:06:21 18 and gentlemen. We heard in the news just over the last week
04:06:23 19 or so that a Capitol police officer was killed in D.C. with a
04:06:27 20 vehicle by a suspect, so we know it is possible.

04:06:30 21 MR. UMINA: Objection, Your Honor. Move to strike
04:06:31 22 that.

04:06:32 23 THE COURT: Sustained. Stay within the confines of
04:06:36 24 this case, Ms. Durst.

04:06:37 25 MS. DURST: Mr. Root testified that police officers

04:06:39 1 are killed quite frequently by vehicles driven by suspects
04:06:44 2 trying to flee. So we know -- and that is one of the facts
04:06:48 3 that Mr. Faulkner told you we know, without a doubt, that
04:06:53 4 Philip Rhoades was in the Jeep.

04:06:57 5 Okay. So let's talk about this case. Mr. Root tried to
04:07:02 6 focus on what he claimed to be inconsistencies, and that was a
04:07:07 7 large focus of the opening statement that was done by
04:07:12 8 plaintiff's counsel in this case as well. All these
04:07:15 9 inconsistencies and the things that they were going to show
04:07:18 10 you.

04:07:20 11 Okay. In the opening statement, and I have written this
04:07:23 12 quote down, they didn't call him Deputy Forsyth, they said the
04:07:29 13 defendant's mind was made up when he drove down that road.
04:07:32 14 That was in the opening statement what evidence was presented
04:07:37 15 to you by the plaintiff in this case that, Deputy David
04:07:43 16 Forsyth made his mind made up when he drove down that road?
04:07:47 17 Absolutely zero. The actual evidence in this case
04:07:52 18 David Forsyth testified he had no professional or personal
04:07:57 19 dealing with Philip Rhoades at any point in time. Before
04:08:01 20 August 2 of 2017. So there was a representation made in
04:08:05 21 opening statements that Deputy Forsyth's mind was made up when
04:08:10 22 he drove down that road. No evidence supported by the
04:08:15 23 plaintiff's case at all.

04:08:20 24 Another statement made by plaintiff's counsel in opening
04:08:23 25 statement directed specifically toward Deputy Forsyth, "If he

1 thought the killing was justified, why not just tell
2 Lieutenant Branham what happened the day of the incident?"
3 That was raised by plaintiff's counsel, and there was a big
4 focus on that in the opening statement.

5 Mr. Root's testimony, please.

6 And the reason I want to show you this testimony, ladies
7 and gentlemen, is because this is the same testimony that I
8 went over with Mr. Root in this case.

9 MR. UMINA: Your Honor, I object to her taking public
10 deposition testimony at this time in the trial.

11 MS. DURST: Your Honor, this is same questions that I
12 asked Mr. Root in the examination.

13 THE COURT: Overruled, but we need to focus on the
14 evidence in the case, not on discovery materials, please.

15 MS. DURST: In Mr. Root's trial testimony, which is
16 consistent with his deposition testimony, he testified that he
17 had no issue with the timing of the statements. He also told
18 you that an individual like Deputy Forsyth or Deputy Love in a
19 high stress-inducing event could have, he said, suffered
20 physiological or psychological effects, that they could forget
21 things for a period of time, and he even told you that they
22 could forget things forever. Why do I bring that up? Because
23 we are also going to talk about these alleged inconsistencies
24 with regard to Deputy Love and Deputy Forsyth, but in the
25 opening statement -- let's go back to the other slide.

04:10:04 1 In the opening statement they said, "If Deputy Forsyth
04:10:09 2 thought that the shooting was justified, why not talk to
04:10:12 3 Trooper Branham at that point in time?" Their own expert
04:10:16 4 concedes he should not have done that. There is nothing wrong
04:10:19 5 with the timing of when they gave the statements. He even
04:10:21 6 said they should have gone with an attorney. So there is
04:10:24 7 absolutely nothing wrong with the timing of when they gave the
04:10:27 8 statements, despite the fact that it was raised in opening
04:10:30 9 statement that there must be something -- if he thought it was
04:10:33 10 justified, why not talk about it at that point in time.

04:10:39 11 In the opening statement it was mentioned that
04:10:42 12 Deputy Forsyth and Deputy Love colluded in their statements to
04:10:46 13 Lieutenant Branham. That was also raised by plaintiff's
04:10:49 14 counsel in the opening statement. Well, the evidence
04:10:52 15 presented, Mr. Root spent hours and hours telling you why he
04:10:57 16 thought that there were inconsistencies. So they colluded,
04:11:04 17 but their statements are inconsistent. That in and of itself,
04:11:08 18 ladies and gentlemen, is an inconsistency right there. If you
04:11:11 19 have two police officers who are going to collude and get
04:11:14 20 their statements straight, well, that is not at all what
04:11:19 21 Mr. Root says the statements say. He says that there are
04:11:22 22 always internal inconsistencies between the statements.

04:11:26 23 So again, there is a focus on supposed inconsistencies in
04:11:32 24 the statements to Lieutenant Branham. But Mr. Root says,
04:11:37 25 "Well, they colluded." Now apparently, we are hearing in

1 closing argument today that there was this big conspiracy,
2 there was collusion. Apparently, the state police must have
3 been colluding with Deputy Forsyth as well.

4 Let's talk about Lieutenant Branham. Lieutenant Branham
5 came in and testified, that consistent with his investigation
6 the Jeep was running and in gear. So the plaintiffs have
7 latched ahold of that and said it had to have been in neutral
8 when Deputy Forsyth fired his weapon. There is no evidence of
9 that. That is pure speculation. They have introduced no
10 evidence that the Jeep was actually in neutral at the time
11 that it was fired. I think everyone concedes, with the
12 exception of Lieutenant Branham not understanding how a manual
13 transmission works. He conceded that the Jeep was running,
14 and as he has now learned, it had to have been in neutral at
15 the time he arrived.

16 Now, so plaintiff likes Lieutenant Branham for that.
17 That -- okay, the Jeep was running, so it was running; it had
18 to be in neutral. We like that part of it, but all the other
19 parts of Lieutenant Branham's testimony, we try to discount or
20 ignore.

21 Lieutenant Branham was called in plaintiff's case in
22 chief. He was their witness. They want you to believe him
23 when he says the Jeep was running, but they ignore his other
24 testimony. What other testimony? He testified that he, even
25 though he has a recollection of, you know, arranging the

04:13:24 1 statements, who he called, and taking the statements, he asked
04:13:31 2 each, Deputy Forsyth and Deputy Love, questions. He testified
04:13:35 3 under oath on the witness stand that he didn't believe that
04:13:38 4 there were any inconsistencies in their testimony -- or in
04:13:41 5 their statements.

04:13:42 6 He also testified that even though they came in with a
04:13:46 7 prepared statement, that he had the opportunity to ask them
04:13:49 8 questions. There were no questions they refused to answer,
04:13:53 9 whatsoever. And that if he had felt that there was additional
04:13:58 10 information that he needed, he would have asked and followed
04:14:03 11 up. He then also testified that based on his investigation,
04:14:10 12 which included going to the scene, the photographs that he
04:14:13 13 took, the statements that he took, listening to the 911 radio
04:14:17 14 traffic, again, that you will hear, or can you take back to
04:14:20 15 the jury room with you at a minimum, that he did not find any
04:14:26 16 evidence in his investigation to contradict Deputy Forsyth's
04:14:32 17 description of the events that occurred. And what does that
04:14:36 18 mean? He didn't find any evidence that the Jeep was not
04:14:39 19 moving at Deputy Forsyth at the time he discharged his weapon
04:14:43 20 on August 2nd of 2017.

04:14:45 21 And if you remember, I asked deputy -- or excuse me,
04:14:49 22 Lieutenant Branham about how he went about preparing his
04:14:52 23 report, who he submitted it to. He testified that he had to
04:14:55 24 prepare it. It then gets submitted to the district commander.
04:14:59 25 And then if the district commander thinks there is additional

information, then he will ask that the lieutenant add additional information. There could be a supplemental report. Even after, you know, being deposed in this case in 2019, and having questions asked of him by plaintiff's counsel in this case, Lieutenant Branham testified that there has been no revision to his investigation into this incident, and that the information that he had still supported his finding that there was no evidence to contradict Deputy Forsyth's and Deputy Loves' description of what happened at that gas well site.

There was some mention in closing argument by opposing counsel that -- they showed you the picture of the gear shift, and said, "Well, if he fell forward, the gear shift would have had to have been pushed forward." We don't know what gear the Jeep was in. That is pure, again, speculation. As Mr. Faulkner said, he would not speculate.

Another point that was made, and I want to touch upon it at this point in time, with regard to the Jeep. They indicated -- Mr. Umina showed you what he described to be the trajectory, and said, well, he had to be ducking this way for cover. I want you to remember, Dr. Savasman was on the witness stand, the deputy medical examiner. My co-counsel, Mr. Carroll, asked him questions if he would be able to tell what the path of -- or trajectory of the bullet was. The only medical person that we heard could not tell you.

Mr. Root is not an expert in the path of trajectory of a

04:16:51 1 bullet. There has been no evidence in this case to show you
04:16:54 2 how the path of that bullet traveled. What Deputy Forsyth
04:16:58 3 told you, he did not tell you that Mr. Rhoades was looking
04:17:04 4 straight ahead, or he did not tell you that he was leaning
04:17:06 5 down at the time he discharged his weapon. What he said was,
04:17:10 6 I saw him leaning down what looked like toward the console or
04:17:15 7 the floorboard and he popped back up.

04:17:19 8 Again, there is no person that has testified in this
04:17:25 9 courtroom that can you tell you how Mr. Rhoades was looking,
04:17:30 10 and how he was positioned at the time the bullet struck him.
04:17:36 11 Again, what Mr. Faulkner has said is a lot of this is
04:17:41 12 speculation because of things that we don't know. What we do
04:17:45 13 know is that -- I think he said repeatedly throughout his
04:17:51 14 testimony, we know the final resting position of the Jeep. We
04:17:54 15 know the final resting position of the cruiser, and we know
04:17:57 16 like the point of the access road, but even that, that depends
04:18:03 17 on where you start the measurement. So again, it's been
04:18:09 18 speculative on the part of the plaintiff in this case. We
04:18:16 19 also talked about -- again, Mr. Faulkner, and nobody can tell
04:18:22 20 you how the Jeep ended in neutral. I can't tell you. I wish
04:18:30 21 I could. Can't tell you how it specifically ended up in
04:18:34 22 neutral, but we know -- and Deputy Forsyth testified he has
04:18:39 23 had a stick shift, learned to drive on manual a transmission,
04:18:43 24 and a manual transmission can be kicked out of gear without it
04:18:48 25 being pushed in. It is very, very, very hard to get it in

04:18:51 1 gear without the clutch pushed in. You can do it, but you
04:18:55 2 have to have the RPMs just right, but to have a manual
04:19:00 3 transmission kicked out of gear, you don't have to have the
04:19:03 4 clutch depressed. What Deputy Forsyth described for you is
04:19:06 5 when he got to the Jeep, Mr. Rhoades was slumped over the
04:19:10 6 console, slumped over where the gear shift was. Can I tell
04:19:15 7 you that that is exactly how the gear shift ended up out of
04:19:21 8 gear, in neutral? Wish I could. Could he have been in the
04:19:26 9 process of shifting gears? We know Deputy Forsyth has
04:19:31 10 described hearing the engine rev, and I think he even said at
04:19:34 11 one point he got on the gas. We don't know if he was in the
04:19:36 12 middle of shifting gears and driving toward Deputy Forsyth at
04:19:41 13 the time that he was struck with the bullet. We just don't
04:19:45 14 know. And that's what Mr. Faulkner repeatedly said. There
04:19:48 15 are only some finite things that we know in this case, a lot
04:19:53 16 of it is unknown. But Mr. Root wants to come in and tell you
04:19:57 17 that all these things are known and it's scientific fact, and
04:20:02 18 it just isn't, ladies and gentlemen.

04:20:08 19 With regard to the Jeep moving, it also came up on the
04:20:12 20 PowerPoint that plaintiff's counsel had, is that the medical
04:20:16 21 examiner testified that Mr. Rhoades was paralyzed
04:20:21 22 instantaneously. They tried to get him to say that, but if
04:20:25 23 you recall, Dr. Savasman wouldn't say that. He said, it is
04:20:29 24 very, very likely, but he wouldn't say that it was absolute.
04:20:34 25 What he said, and if you remember he made some kind of

comment, you can shoot in the sky and maybe hit a bird. He made a comment like. That he could not say with absolute 100 percent certainty that Mr. Rhoades would have been immediately paralyzed when he was struck with the bullet. They want you to take Dr. Savasman's testimony and say that he was paralyzed instantaneously, and couldn't move his arms or legs.

There is kind of like another point to that, then. Okay. Dr. Savasman also said I believe that when he would have -- the bullet would have lacerated his spine, his body organs would have shut down. Think about that. Can't have it both ways. If he is paralyzed he can't move, and his vital organs shut down, he can't move the Jeep. But then talking about the pain and suffering that they are trying to claim that he experienced, you can't have it both ways, ladies and gentlemen. And Dr. Savasman said he can't tell you with 100 percent certainty that he was paralyzed instantaneously. It is very, very likely, but we don't have the burden to prove that he was. That is part of the theory of their case that he was paralyzed instantaneously and therefore couldn't shift the gear. He wouldn't have had to have been -- he wouldn't have had to shift the gear if he was slumped over and knocked the Jeep out of gear in the first place.

Let's talk about the rest of the story then. We have talked a little bit about Lieutenant Branham. We have touched

1 upon the inconsistencies. There are no inconsistencies in
2 this case, ladies and gentlemen, between Deputy Forsyth's and
3 Deputy Love's statements. Why do I say that? Well, Mr. Root
4 conceded that people witnessing the same event can have a
5 different recollection. Could be in part because of their
6 positions of what they were seeing, where they were situated
7 at a specific point in time.

8 We know in this case that Deputy Forsyth would have been
9 exiting his cruiser on the driver's side, so he would have had
10 a view of what was happening there. We also know that he was
11 trying to get to the rear of the cruiser, which unfortunately
12 didn't happen because the cruiser was not in gear and
13 continued to move forward.

14 We know Deputy Love would have been exiting the cruiser
15 on the passenger's side. He would have had a different view
16 and a different vantage point. You have seen the pictures of
17 the cruiser. It's an SUV, so it would impair someone's
18 ability to see over the top of the cruiser. So it's going to
19 affect what Deputy Love sees versus what Deputy Forsyth was
20 seeing at the time. No inconsistencies.

21 I talked with Mr. Root about who located the access road.
22 He tried to say that there was an inconsistency between their
23 statements because Deputy Love said he is the one that located
24 the access road, but then he said Deputy Forsyth said he is
25 the one that did. If you remember, I had him pull out

04:24:02 1 Deputy Forsyth's statement. Deputy Forsyth never said he
04:24:06 2 located the access road. He said there was an access road to
04:24:09 3 the right or whatever. He never said he located the access
04:24:13 4 road. Mr. Root was interpreting that to mean Deputy Forsyth
04:24:18 5 said he located the access road, and then he wants to use that
04:24:22 6 interpretation to support some claim that there is an
04:24:25 7 inconsistency between their statements. There isn't.

04:24:31 8 There is no evidence to contradict Deputy Forsyth's and
04:24:37 9 Deputy Loves' description of the event. And again, Trooper
04:24:42 10 Branham indicated that if he had seen any such
04:24:45 11 inconsistencies, he would have noted that in the report that
04:24:49 12 he prepared. He did not note any inconsistencies.

04:24:53 13 And we talked about the photos of the ground disturbance.
04:24:56 14 Now, I want to touch on those for a second. I wasn't trying
04:25:01 15 to trick you. There are photos. There was an argument in
04:25:05 16 this case that there are no photos showing any ground
04:25:08 17 disturbance. Clearly there are. I think what Mr. Faulkner
04:25:14 18 told you is, we can't say. Could the Jeep have caused it?
04:25:19 19 Maybe. Could one of the other vehicles in there caused that?
04:25:23 20 Maybe. Don't know. And that's what he kept saying. We don't
04:25:27 21 know. But to argue that there is no evidence of any ground
04:25:33 22 disturbance in those photographs is just completely contrary
04:25:37 23 to the photographs, including the photographs that we
04:25:39 24 introduced that were not introduced to you by the plaintiffs
04:25:42 25 in this case.

04:25:46 1 So then let's talk about Corey Love. They told you in
04:25:50 2 the opening statement that they would show Corey Love lied.
04:25:54 3 Well, a lot of lies is about Trooper Branham contacting him
04:25:59 4 about giving a statement. Corey Love testified, and you saw
04:26:04 5 his deposition played here by way of video. He testified in
04:26:10 6 September of 2019, "Not that I can remember, no." He didn't
04:26:15 7 say "No."

04:26:17 8 Not that I can remember. How many times do we all answer
04:26:20 9 a question like that; not that I recall, not that I remember?
04:26:24 10 You are not saying with 100 percent certainty that that
04:26:28 11 absolutely did not happen.

04:26:32 12 Does it really matter, ladies and gentlemen? They gave
04:26:35 13 their statements separately. Whether you believe the
04:26:40 14 plaintiff's version that they tried to collude. They gave
04:26:43 15 statements separately, answered direct requests proposed to
04:26:49 16 them by then a sergeant with the West Virginia State Police
04:26:53 17 who said, "If I had any additional questions I could have
04:26:56 18 asked them." And he found no inconsistencies with the
04:26:59 19 statements.

04:27:01 20 Corey Love, he was asked whether he washed his hand or
04:27:04 21 not after the incident. Has there been any dispute presented
04:27:12 22 to you in this case that Corey Love discharged the weapon?
04:27:15 23 That is the purpose of the gunshot residue test, is whether he
04:27:19 24 washed his hands or not. There has been no question, no
04:27:21 25 dispute in this case, that it was Deputy Forsyth who

04:27:25 1 discharged his weapon. Focusing on something like that,
04:27:28 2 ladies and gentlemen, is red herring. Corey Love, whether he
04:27:33 3 remembered or not, again, this deposition where he testified
04:27:37 4 that was played to you, was taken two years after the fact at
04:27:41 5 a time when he was no longer with the sheriff's department.
04:27:46 6 He was in Georgia. He was down there. He had gone down there
04:27:50 7 and I think he was working at the YMCA at the time. No reason
04:27:54 8 to make something up about whether he washed his hands or he
04:27:58 9 didn't wash his hands. Yeah, it might make sense in this case
04:28:01 10 if there was an issue in this case as to who actually fired
04:28:03 11 the weapon. There is no question about that in this case at
04:28:08 12 all.

04:28:09 13 Something else, if you recall I went over this with
04:28:12 14 Mr. Root in his deposition, that there was this supposed
04:28:16 15 inconsistency that Deputy Forsyth -- or excuse me -- Deputy
04:28:20 16 Love never described any movement of the Jeep at all, period,
04:28:24 17 until Deputy Forsyth exited the cruiser. And if you remember,
04:28:29 18 I had to get Mr. Root to pull the transcript out finally,
04:28:33 19 because what Deputy Love described, he said, "As soon as we
04:28:40 20 pulled in, the Jeep started -- it started coming out." There
04:28:47 21 is no inconsistency with regard to his testimony. He never
04:28:51 22 said the Jeep was stopped, like they represented, like
04:28:55 23 Mr. Root represented. He said, as soon we pulled in, it, or
04:29:01 24 the Jeep, started coming out.

04:29:04 25 I went over it with Mr. Root then, that part of the

04:29:08 1 reason he believed there was a conflict between Deputy -- I
04:29:14 2 think I have it actually right here -- that he thought there
04:29:16 3 was a conflict between Deputy Love's and Defendant Forsyth's
04:29:21 4 statement is that Deputy Love had not described the Jeep as
04:29:23 5 moving at any point in time. On the witness stand, I finally
04:29:28 6 got him to concede that Deputy Love described the Jeep's
04:29:31 7 location as being about 10 to 15 feet off the left side, and
04:29:36 8 "As soon as we pulled in, he started coming out." He read
04:29:39 9 that from the statement, finally after going back and forth
04:29:43 10 with him over that, he finally conceded that.

04:29:47 11 So despite Mr. Root's opinion that Deputy Love had not
04:29:51 12 described the Jeep moving at any point in time before
04:29:55 13 Deputy Forsyth exited the cruiser, Deputy Love actually did
04:29:59 14 tell, then sergeant, now Lieutenant Branham, that as soon as
04:30:04 15 they pulled into the site, that Jeep started coming out.

04:30:10 16 Differences in statements does not equal inconsistencies.
04:30:14 17 And again, I went through all these questions with Mr. Root.
04:30:17 18 A conflict in how a person describes an event, versus how
04:30:22 19 another person described that same event, can depend upon the
04:30:26 20 position --

04:30:26 21 MR. UMINA: Your Honor, I am going to object. We
04:30:27 22 don't know if this -- specifically how these questions were
04:30:31 23 asked and answered during the trial.

04:30:32 24 THE COURT: It's up to the jury to recall that.

04:30:34 25 You may proceed.

04:30:35 1 MR. UMINA: Absolutely, Judge.

04:30:37 2 MS. DURST: Mr. Root testified that in a conflict and
04:30:40 3 how a person describes an event versus how another person
04:30:44 4 describes that same event, as we just talked about, can depend
04:30:48 5 upon the position of each person in relation to the event that
04:30:52 6 he or she is witnessing.

04:30:53 7 So if you have one person standing in one location and
04:30:57 8 another person standing in a separate location, what each
04:31:00 9 person sees could be different. It could also depend upon the
04:31:03 10 memory of each person, and that following, as we talked about,
04:31:06 11 a high stress event, like a shooting, it is not uncommon for a
04:31:11 12 person not to remember certain things occurring at all.

04:31:20 13 Corey Love testified in trial by way of video. He was
04:31:25 14 asked with regard to what he was feeling, what he saw. He
04:31:33 15 candidly admitted he did not see Deputy Forsyth fire his
04:31:38 16 weapon. He is going to make something up to help
04:31:45 17 Deputy Forsyth? He would make something up to say I saw him?
04:31:51 18 He said, I didn't see him fire his weapon. What he saw was,
04:31:56 19 he said, from the middle to the back of the Jeep moving
04:32:00 20 forward. That is what he was able to see from his
04:32:03 21 perspective, and that's what he described to you. And what he
04:32:07 22 described was that he thought Dave, Deputy Forsyth, was going
04:32:13 23 to die. That's what he was seeing from the perspective that
04:32:17 24 he had with a Jeep from the middle to the back moving forward
04:32:22 25 in what he believed was Deputy Forsyth's direction.

1 Let's talk about Deputy Forsyth. They told you in the
2 opening statement that they would show that Deputy Forsyth
3 lied. And they talked about the lies in regard to the
4 circumstances of his statement that he gave to Lieutenant
5 Branham. They had Deputy Forsyth on the stand, and they never
6 asked him a single question about anything that occurred after
7 the shooting. Not one. Not if he asked Lieutenant Branham to
8 give a statement with Corey Love. Didn't ask anything about
9 how his written statement came about. Never asked any of
10 those questions at all of Deputy Forsyth on that witness
11 stand. They wanted to rely on deposition testimony to
12 establish that he lied somehow. They spent quite a bit of
13 time cross-examining him on that witness stand and never asked
14 a single question about anything that occurred. They didn't
15 ask about if he is the one that took Mr. Rhoades out of the
16 Jeep or took Mr. Rhoades out of Jeep. They didn't ask any of
17 those questions.

18 They also put the use of force policy up there. Not a
19 single question asked of Deputy Forsyth with regard to the use
20 of force policy at all. Not one question.

21 So another thing with regard to Deputy Forsyth, in the
22 opening statement by plaintiff's counsel, there was a
23 statement made -- or it may have been in questioning of
24 Deputy Forsyth -- that he saw this Jeep go by and he just
25 pulled out and started following it. Ladies and gentlemen, we

1 know, that is something we do know, that did not happen. It
2 was over the radio, that the Marion County Sheriff's
3 Department was in pursuit of what was believed to be a black
4 in color, soft top, Jeep Wrangler with an individual who was
5 believed to be armed. And then Deputy Forsyth was traveling
6 on Route 250 near North Marion in that area, and sees a Jeep
7 matching that description. If you remember, he radios. He
8 asks, I think it's Deputy Mundell, if he passed a Jeep.
9 Deputy Mundell said, "Negative". Deputy Forsyth apparently
10 didn't hear him, asked him again, and you can hear in the
11 radio traffic, "I said negative." So Deputy Forsyth knew the
12 Jeep had not gone in that direction. He sees this black Jeep,
13 starts to participate in the pursuit that was already active
14 by the Marion County Sheriff's Department. He didn't just see
15 a Jeep driving by and then decide to follow it. There was
16 radio traffic that indicated that there was already a pursuit
17 in progress, and he, as Mr. Faulkner testified to, he did his
18 duty and assisted in that pursuit.

19 As the Judge has said, you have to decide this case based
20 on the objective reasonableness of Deputy Forsyth's actions on
21 August 2nd, not with hindsight in what was learned after the
22 fact. It is, what was known at that time, was
23 Deputy Forsyth's actions reasonable or not? So you have to
24 walk in his foot path, ladies and gentlemen, okay. Let's walk
25 down -- let's go down that path. You know that you are

04:36:21 1 pursuing a Jeep that has an individual who may be armed. You
04:36:28 2 pull into -- you go down this access road that -- we have seen
04:36:33 3 the photographs. You pull into what has been described as the
04:36:37 4 mouth of the bowl. You pull into the opening to that gas well
04:36:41 5 site. You see a Jeep. Immediately, as you start to pull in,
04:36:47 6 the Jeep starts to come out and almost hit your cruiser. You
04:36:54 7 then see the Jeep start to do a three-point turn. You get of
04:37:01 8 your cruiser. Give audible commands. "Get out of the
04:37:07 9 vehicle, stop the vehicle, show me your hands; stop the
04:37:10 10 vehicle, show me your hands." The individual in the Jeep,
04:37:15 11 that we know is Mr. Rhoades, doesn't comply. You continue to
04:37:20 12 give those commands; "stop the vehicle, show me your hands."
04:37:27 13 He does not comply. "Stop the vehicle, show me your hands."
04:37:35 14 And all the while you thought you would have cover from your
04:37:40 15 cruiser, didn't get in park, so it continues to move, so you
04:37:44 16 are now in this open area exposed. You have given the suspect
04:37:50 17 commands, "Stop the vehicle, show me your hands." Bam! The
04:37:57 18 Jeep comes at you. Now I ask you: In that circumstance,
04:38:04 19 would you have fired your weapon? That is what you have to
04:38:07 20 decide.

04:38:07 21 You have to put yourself in Deputy Forsyth's foot path
04:38:11 22 and make a decision as to whether his conduct was objectively
04:38:16 23 reasonable on August 2nd in light of all that information.

04:38:26 24 So I don't even know where to begin with Mr. Root. He is
04:38:33 25 a law enforcement officer who says he has 27 years of

04:38:37 1 experience and apparently didn't know how to figure out how
04:38:43 2 the radio traffic worked; it was in reverse order, and I had
04:38:46 3 to figure it out, and it was all chopped up. That's exactly
04:38:51 4 the way that he listened to it, ladies and gentlemen. That's
04:38:54 5 the way it was provided in the course of this case. To say
04:38:58 6 that he didn't know that information until he heard it here
04:39:03 7 with Deputy Forsyth from the witness stand is completely and
04:39:07 8 utterly ridiculous.

04:39:12 9 He also said that, well, we know that Mr. Rhoades wasn't
04:39:17 10 going to take that Jeep up the embankment. Really? How in
04:39:23 11 the world could he sit there with a straight face and say that
04:39:26 12 he knew that Mr. Rhoades wasn't going to take that Jeep up the
04:39:30 13 embankment? No one knows. But to sit here and tell you
04:39:35 14 that -- so the reason he is saying that is that, well, the
04:39:40 15 exit where the -- back out to the access road, that is the
04:39:44 16 only way out. We don't know that. We have no idea of knowing
04:39:51 17 that, and again, that is what Mr. Faulkner was trying to tell
04:39:54 18 you, that he is not going to speculate about some of these
04:39:58 19 things that Mr. Root speculated about.

04:40:02 20 The photograph of the tire print. Remember, I went over
04:40:05 21 that with him? It's the one I think you have in evidence. He
04:40:10 22 said, well, it shows a clearly defined tire pattern. It
04:40:16 23 couldn't have been going that fast, so couldn't have been made
04:40:20 24 by the cruiser. Well, we know that the ambulance went in
04:40:25 25 there because we know that by the time Lieutenant Branham

arrived, Mr. Rhoades had already been taken from the scene.

The ambulance is going to take all their supplies, carry them down that access road? Ambulance went in there. We have no idea -- again, what Mr. Faulkner was trying to impart to you -- you have no idea how many vehicles had driven down that road by the time Lieutenant Branham actually had the opportunity to take that photograph.

Now, he also repeatedly used the phrase, arena of performance. Well, I have to tell you, ladies and gentlemen, I spent almost six hours with him taking his deposition, that was almost 280 pages and not once, not once did he describe the arena of performance, and not once did he mention the time and distance calculations that he tried to tell you yesterday. Not once. And he had all the information, other than doing the site investigation, that he said didn't change his opinions. I will leave Mr. Root at that. There is much, much more that could I say, but I will leave it at that.

And then we have Mr. Faulkner that you heard from today. Mr. Faulkner has, as I kind of eluded to and mentioned, he trains the trainers. So the individuals at the various state police academies, whatever they are called in various states, he trains those individuals to train the officers that are going through getting certified. We have the research project that he has done, and he explained to you why and how that research project came about. And based on that information he

04:42:24 1 reviewed -- they want to say he didn't review all the
04:42:29 2 evidence. Yeah, he did. He absolutely reviewed all the
04:42:31 3 evidence. He is just unwilling to do what Mr. Root is
04:42:34 4 apparently willing to do, is speculate with regard to evidence
04:42:39 5 that is not objective. You can call it objective evidence.
04:42:44 6 You can put a term on anything. Doesn't mean it's objective
04:42:50 7 evidence, whatsoever.

04:42:51 8 Mr. Faulkner, he wouldn't even tell you that -- he
04:42:56 9 wouldn't use the phrase that Mr. Root used, objectively
04:42:59 10 reasonable. That's for you to decide. And that's what Mr.
04:43:02 11 Faulkner told you. What he told you was, based on his years
04:43:06 12 of experience, the research studies that he has done, all of
04:43:10 13 the training that he had done, the Force Science Institute
04:43:14 14 which is the same one that Mr. Root wanted to repeatedly
04:43:19 15 mention, based on all of that and the facts that Deputy
04:43:20 16 Forsyth was confronted with on August 2nd of 2017, that
04:43:27 17 Deputy Forsyth's actions complied with the Supreme Court
04:43:31 18 guidelines and National Law Enforcement Operational Practices.
04:43:35 19 And you will have -- the Judge has read you the law with
04:43:39 20 regard to the objective reasonableness. You will have all of
04:43:43 21 that. But we don't look at this as Mr. Root tries to do --
04:43:47 22 even though he says he doesn't -- we don't look at this in
04:43:52 23 hindsight. We don't get to Monday morning quarterback
04:43:56 24 Deputy Forsyth. That's not the way it works. We have to look
04:43:59 25 at the information he had available to him as he was in that

entrance to that gas well site, not that there is a ditch down over the hill and there is an embankment. He has never been in the area before. So that is new information to him. He has got a Jeep who fled, almost hitting an oncoming car in the opposing lane of traffic with a suspect believed to be armed, and then the Jeep is coming at him. That is the information that you have to use to judge whether Deputy Forsyth's conduct was objectively reasonable.

And, ladies and gentlemen, I am not going to take the time to switch to the projector. You will have the verdict form. Mr. Umina showed it to you. The very first question: Do you find the plaintiff has proven by a preponderance of the evidence the force used by Defendant David Forsyth toward Philip Jontz Rhoades on August 2nd was excessive and objectively unreasonable? There is a couple key components to that. If the plaintiff has proven. We don't have to prove to you that it was not objectively reasonable. They have the burden to prove that.

We don't have to prove to you that it was objectively reasonable. They have the burden of proving that. And, ladies and gentlemen, I submit based on the evidence that you have heard over now the past technically these days, because we didn't hear any evidence or witnesses on the first day, that that answer is no. They have not met their burden to prove by a preponderance of the evidence that Deputy Forsyth's

actions on August 2nd were anything other than objectively reasonable. If that -- if you answer the question "no," you are done.

As the Judge advised you, and the instructions are on there, you complete the verdict form, sign it, and date it, and you are done.

So the last part of this I have to address is the comment that was made in closing argument by opposing counsel, which was, well, if Defendant Forsyth thinks that he didn't do anything wrong, why do they ask a single question of Christy Rhoades or Rick Rhoades?

Ladies and gentlemen, I wouldn't be doing my job to represent Deputy Forsyth, nor would Mr. Carroll be doing his job if we didn't ask those questions. Do I believe the evidence supports the answer that I just told you on that verdict form? 100 percent. Unfortunately, I am not in that jury box. And I don't get to decide it. You do.

You might think, "She is out of her mind. She is crazy. We don't believe a word she says." Then I have to address damages then. If I didn't address potential damages in this case, I would be doing a complete and total disservice to my client who I owe an obligation to represent. So let's talk about, and this is never -- this is never an easy topic. It's not fun at all. I don't relish the opportunity to address these issues, but I have to.

04:47:36 1 There was a statement made in opening statement that
04:47:40 2 there would be no more birthday parties, no more T ball.

04:47:46 3 There were a number of questions asked of Ms. Rhoades on the
04:47:49 4 witness stand, ladies and gentlemen, with regard to the
04:47:52 5 interaction that the sons of Philip Rhoades had with their
04:47:59 6 father in the years leading up to his death. Although Ms.
04:48:05 7 Rhoades didn't want to answer those questions, I understand
04:48:07 8 why, but those questions go to the damages that are being
04:48:13 9 sought in this case.

04:48:15 10 We know that the boys lived with their mother from about
04:48:24 11 2013 until 2014. And that they would stay at their
04:48:29 12 grandfather's house or her sister's, and that's where they
04:48:33 13 would see their father. We know Mr. Rhoades did not go to
04:48:37 14 parent teacher conferences, he didn't go to medical
04:48:40 15 appointments, he didn't go to any urgent care appointments, he
04:48:45 16 didn't provide any financial support for the boys. That is
04:48:50 17 the reality of the evidence in this case. So that is
04:48:59 18 something -- I can't tell you how you take that into
04:49:03 19 consideration. But I submit to you, ladies and gentlemen,
04:49:06 20 it's relevant to the claim in this case that -- you know, I
04:49:12 21 think it was made in opening or closing argument, that they
04:49:17 22 would never be able to call their dad, or their dad wouldn't
04:49:21 23 be able to call them. In the year leading up to his death,
04:49:24 24 Mr. Rhoades didn't call the boys. I specifically asked that
04:49:28 25 question. He didn't call them. These are the facts, ladies

04:49:33 1 and gentlemen.

04:49:34 2 We also -- there was closing argument about the memories.
04:49:38 3 Well, I think if I recall correctly, Ms. Rhoades testified at
04:49:47 4 the age her youngest son Philip was, that he didn't really
04:49:48 5 have a lot of memories of his father, and at that point in
04:49:52 6 time she admitted that he was spending more time with her than
04:50:01 7 significant other Todd Stevens, than he was with his father.

04:50:04 8 So those are the facts, ladies and gentlemen. I didn't
04:50:09 9 make them up. That is the evidence that you have to consider
04:50:12 10 if you get to that point of the verdict form. I don't believe
04:50:19 11 that the evidence supports that in this case, that you even
04:50:24 12 get past the first question. But whether it's fun or not, I
04:50:29 13 have to bring that evidence to your attention. You heard it.
04:50:33 14 It's there. You do with it what you want.

04:50:39 15 Again, I would not be doing my job in representing my
04:50:43 16 client if I also didn't lastly address the issue with regard
04:50:47 17 to punitive damages. The Judge has given you again the
04:50:51 18 instructions, and you will have the verdict form. You can
04:50:57 19 only award punitive damages if you find that Defendant Forsyth
04:51:00 20 was motivated by evil motive or intent. That has not been
04:51:05 21 established here, despite the fact that the claim was made in
04:51:09 22 opening statement that he drove down that road with his mind
04:51:12 23 made up. There is no evidence. In fact, we know that he
04:51:15 24 hadn't even had any dealings with Philip Rhoades at any point
04:51:18 25 in time before August 2nd. So the rest of it, then, is

04:51:22 1 Defendant Forsyth's conduct involved reckless or callous
04:51:24 2 indifference to the federally protected rights of Mr. Rhoades.
04:51:29 3 Again, for the reasons that I have articulated to you, ladies
04:51:33 4 and gentlemen, as to why we do not believe that there was any
04:51:37 5 excessive force used by Deputy Forsyth in this case, it's the
04:51:43 6 same reason that there should be no punitive damages assessed
04:51:48 7 against Deputy Forsyth. He was doing his job. He was
04:51:52 8 pursuing a suspect, as part of a pursuit with the Marion
04:51:57 9 County Sheriff's Department, and he did his job.

04:52:01 10 Whether his conduct was objectively reasonable is for you
04:52:10 11 to judge. I would simply ask that you do as the Court has
04:52:16 12 instructed you and not look at this with 20/20 hindsight,
04:52:21 13 don't Monday morning quarterback him. Look at this based on
04:52:26 14 the information and the evidence that was available to
04:52:30 15 Deputy Forsyth when he was facing that Jeep driving at him,
04:52:36 16 and the action that he took in response to that threat.

04:52:41 17 I thank you for your time.

04:52:47 18 THE COURT: Thank you, Mr. Durst.

04:52:49 19 Mr. Prince, will you handle rebuttal, sir?

04:52:52 20 MR. PRINCE: I am not, Your Honor.

04:52:55 21 THE COURT: Mr. Umina, you have ten minutes.

04:52:58 22 MR. UMINA: Yes, Your Honor.

04:53:12 23 May it please the Court, counsel.

04:53:16 24 Now, what I found really interesting about that closing,
04:53:20 25 they didn't show you a single piece of evidence. They didn't

04:53:27 1 show you a single piece of physical evidence. And they spent
04:53:34 2 a majority of the beginning of the time trying to attack the
04:53:38 3 timeline that they established. Folks that tells you
04:53:43 4 everything you need to know about this case. They just stood
04:53:47 5 up in closing argument and didn't you show you a single piece
04:53:52 6 of evidence. They are trying to confuse you. They are trying
04:53:59 7 to talk about this, that, and anything else that has
04:54:03 8 absolutely nothing to do with the singular fact to decide
04:54:08 9 regarding liability in this case, was the Jeep in gear
04:54:11 10 aggressively advancing towards David Forsyth or was it in
04:54:17 11 neutral? Did he shoot someone in complete violation of his
04:54:19 12 own policy and *Tennessee v Garner*? That is the issue here.
04:54:24 13 And when you go back to that jury room, every single thing
04:54:29 14 that doesn't relate to the issue of was the Jeep moving or was
04:54:33 15 the Jeep not moving, it doesn't matter. It doesn't remotely
04:54:40 16 matter. And they just stood up here in the summation of this
04:54:43 17 trial and didn't show you a single piece of evidence. What
04:54:49 18 does that tell you? The evidence is terrible for them.

04:54:57 19 You know, that photo, I already told you, you were all
04:55:04 20 here, you were all here and watched them try to take this
04:55:11 21 photo and use it as evidence of tires spinning. You watched
04:55:17 22 them do it. And then they just got up here and tried to give
04:55:21 23 you an excuse. And you want to know the very first time the
04:55:23 24 word perpendicular ever came out of the defendant's mouth
04:55:28 25 since this case was filed? After I got Sergeant Branham to

04:55:33 1 admit that the Jeep would have had to be perpendicular to make
04:55:33 2 those lines. The first time out of his mouth in nearly four
04:55:39 3 years.

04:55:43 4 You know, he said something. He said he shot that deer
04:55:46 5 in the head, or shot the deer five times, because it had
04:55:52 6 broken legs, and he didn't want it to run away. A deer with
04:56:01 7 broken legs trying to run away, sounds a lot like a Jeep in
04:56:06 8 neutral trying to run somebody over. It's not possible.

04:56:11 9 The deer has broken legs. How is it going to run away?
04:56:17 10 The Jeep was in neutral. How was it ever a threat to him?
04:56:24 11 But he shot that deer at close range not once, not twice, not
04:56:33 12 three times, not four times, but five times. He is trigger
04:56:42 13 happy. Who shoots a deer to put it down at close range five
04:56:48 14 times, and then walks into court and says, I didn't want him
04:56:52 15 to run away, his legs were broken? How does a deer with
04:56:56 16 broken legs run away? And then hours later he pulls up and
04:57:00 17 somebody fled, seven shots. Kills a man. We know that
04:57:05 18 40-caliber -- only takes one bullet to put a man down. A deer
04:57:10 19 with broken legs, only takes one bullet. He shot that thing
04:57:16 20 five times. What does that tell you about him and his gun?

04:57:25 21 They didn't show you any evidence in their summation,
04:57:30 22 folks, in their closing argument. That grass that is backed
04:57:36 23 up right against that bumper. There is not one tire mark
04:57:41 24 aligned with these tires. He says the Jeep tires were
04:57:46 25 spinning, heavy on the gas, rapidly accelerating. He fired

04:57:51 1 until the threat stopped. Where is the evidence?

04:57:59 2 Again, they tried to prove their case with this picture.
04:58:05 3 False. Lieutenant Branham told you, that's not what they are
04:58:12 4 trying to tell you. The evidence isn't there folks. Why are
04:58:18 5 they so worried about the timeline? Why is it the first thing
04:58:21 6 the expert led off with? It is very, very bad for them. Cold
04:58:30 7 hard objective facts.

04:58:32 8 Listen, I know this is tough. I know it is tough to say
04:58:38 9 to yourself this police officer did something very, very, very
04:58:45 10 wrong. He killed someone in violation of the Constitution.
04:58:51 11 We don't want to believe that about our police officers. Good
04:58:58 12 cops and bad cops wear the same badge, ladies and gentlemen,
04:59:06 13 for every hard working, honest, good police officer out there.
04:59:14 14 And that's majority of them, okay. That is the majority of
04:59:18 15 police officers out there. They are honest, hard working guys
04:59:22 16 and women, and they do -- they have a dangerous job. And it
04:59:29 17 does present a lot of situations that do threaten their life,
04:59:34 18 but for the defendant to get up here and try to hide behind
04:59:38 19 completely unrelated cases, completely unrelated incidents,
04:59:47 20 that didn't even involve him, that is not what you are here to
04:59:52 21 consider.

04:59:54 22 And for all of those good police officers out there, and
04:59:57 23 for all of those police officers who have lost something, that
05:00:06 24 is why you have to identify the bad ones, the ones who violate
05:00:13 25 their policies, and then try and cover it up. One bad apple

05:00:19 1 does spoil the whole bunch, because now he does this, now
05:00:26 2 Corey Love has got to get in line with it.

05:00:30 3 And let's think about Corey Love and what happened for
05:00:34 4 just as moment, okay. Have you ever been sitting at a traffic
05:00:38 5 light, and you are stopped, and there is a car next to you.
05:00:42 6 And the car next to you starts going, and you start feeling
05:00:46 7 like you are moving backwards? Anybody ever experience that?
05:00:49 8 Corey Love doesn't know he is jumping out of a moving vehicle
05:00:52 9 or he wouldn't have run to the front of it. Nobody would run
05:00:55 10 to the front of a car that they think is moving forward. So
05:01:00 11 if Corey Love really did think he saw the back of that Jeep
05:01:01 12 moving, it is because he jumped out of a moving car, didn't
05:01:04 13 realize it was moving. He is looking back. He thinks this is
05:01:07 14 stationary. So the Jeep looks like it is moving. But that is
05:01:11 15 not what is happening. This car is moving. Let's give Corey
05:01:15 16 the benefit of the doubt, and all he hears are shots. And he
05:01:20 17 said, "I don't know what happened. I think Dave was going to
05:01:24 18 die or Dave died" or whatever, right? But he is basing that
05:01:26 19 off of he jumps out of a moving car that he thinks is
05:01:30 20 stationary. It's moving. The Jeep is stationary, but the --
05:01:33 21 all he can see is the back. The back disappeared because this
05:01:36 22 car is moving. And then, "He tried to run me over. He tried
05:01:43 23 to run me over," that's what Dave says. No, Dave hopped out
05:01:46 24 of that car, the defendant, and he put seven rounds into it in
05:01:54 25 the blink of an eye. No body camera to show it. No dash cam

05:02:02 1 to the show it. No evidence. Isolated gas well site at the
05:02:06 2 dead end of a dirt road and there was nobody there to see it.
05:02:10 3 When he jumped out of that car without even putting it into
05:02:15 4 park, he was (indiscernible) out that day. He was on high
05:02:18 5 alert. Sees the vehicle jumps out. Seven rounds. Kills
05:02:24 6 Philip Rhoades. The timeline doesn't give him enough time to
05:02:28 7 do all of the things he said he did. There is just no way.
05:02:32 8 There is just no way.

05:02:34 9 And for every hard working police officer out there,
05:02:41 10 serving with pride, honor, and courage, protect them. Don't
05:02:46 11 allow this kind of behavior to go on. Send a message; we will
05:02:52 12 not tolerate this in policing. You cannot kill someone and
05:02:56 13 attempt to cover it up because you violated a policy.

05:03:01 14 He could have just said, "I messed up. I messed this one
05:03:05 15 up." But he denies it, and denies it, and denies it. But
05:03:10 16 devil is in the details. And at his trial for doing this,
05:03:17 17 they didn't give you one piece of evidence to look at to
05:03:22 18 support their theory, not a single one.

05:03:26 19 THE COURT: One minute, Mr. Umina.

05:03:28 20 MR. UMINA: Ladies and gentlemen, justice dies in
05:03:36 21 darkness. He thought that he could give this story. Corey
05:03:45 22 didn't see anything. He is running around a moving vehicle.
05:03:49 23 He hears gunshots, okay. His dad worked for the department
05:03:53 24 for 20 some years. Defendant tells him this story. Corey
05:03:59 25 didn't even have time to get to the front of the vehicle.

05:04:02 1 That's how fast the shooting started when they jumped out.
05:04:05 2 Seconds. I mean seconds. How long does it take for an
05:04:10 3 Explorer to go 30 feet? This happened in seconds. He
05:04:13 4 couldn't have done all the things that he said that he did,
05:04:16 5 ladies and gentlemen. And he thought they would rubber stamp
05:04:19 6 this, put it in a drawer, and no one would ever know because
05:04:22 7 justice dies in darkness. Be the light, ladies and gentlemen.
05:04:29 8 You be the light. Thank you.

05:04:35 9 THE COURT: Thank you, counsel.

05:04:38 10 Ladies and gentlemen of the jury, it's now time to retire
05:04:40 11 to your jury room to begin your deliberations. As we
05:04:44 12 mentioned again, your first order of business will be to
05:04:48 13 select a jury foreperson. You can proceed from there. If you
05:04:51 14 give us just a brief moment, the verdict form, as well as all
05:04:56 15 the exhibits will be brought back to you. At this point, my
05:04:59 16 warning no longer applies. You may finally begin your
05:05:03 17 deliberations and discuss the case with one another.

05:05:04 18 We will excuse you at this time to do so. Thank you very
05:05:07 19 much.

05:05:07 20 (Jury excused to begin deliberations, and the following
05:05:07 21 transpired in open court.)

05:05:31 22 THE COURT: Thank you, counsel.

05:05:32 23 Madam Clerk, you have everything, correct?

05:05:35 24 Counsel, we're going to impose on you to make a quick
05:05:54 25 look at the stack of exhibits to make sure everything is

05:05:56 1 there.

05:07:59 2 Is counsel satisfied all exhibits are present?

05:08:02 3 MR. UMINA: Yes.

05:08:02 4 MS. DURST: Yes.

05:08:03 5 THE COURT: Madam Clerk has taken those back. There
05:08:08 6 are conference rooms available to you. I don't think anybody
05:08:10 7 has a local office. If you do leave the building just leave a
05:08:19 8 cell phone number so we can get ahold of you immediately here
05:08:22 9 in the courtroom. Otherwise, we will be in "wait and see"
05:08:25 10 mode.

05:08:25 11 (Recess taken at this time 5:08 p.m.- 7:50 p.m.)

07:50:30 12 THE COURT: Good evening, everyone. We have our
07:50:32 13 first jury question contrary to our instructions. The note
07:50:35 14 from the jury, which is signed by the foreperson, I believe,
07:50:39 15 it is Michael Dawson, "Currently split seven to one. No signs
07:50:46 16 of agreement on the way. Please advise."

07:50:50 17 To be candid, I have never had one like this. So does
07:50:55 18 anyone have any thoughts as to how we should advise back at
07:50:59 19 this point? I am happy to talk first while you guys think.

07:51:05 20 It feels premature for an Allen charge at this point,
07:51:09 21 considering it's the first note we have received. They have
07:51:15 22 been deliberating less than three hours, so again, it feels
07:51:20 23 early for a declaration of hopelessly deadlocked.

07:51:27 24 One option is to have them come in and encourage them to
07:51:31 25 continue their discussions and continue deliberations.

07:51:35 1 Another option is excuse them for the evening, ask them to
07:51:40 2 come back Monday morning, but again I am open to any thoughts
07:51:44 3 anybody has.

07:51:45 4 MR. UMINA: We would prefer they continue to
07:51:48 5 deliberate.

07:51:48 6 THE COURT: Sure. But at some point we are going
07:51:51 7 to -- feels as if we are going to butt our heads against the
07:51:55 8 wall.

07:51:56 9 MR. CARROLL: Your Honor, I think we are in
07:51:57 10 agreement. We would like to further have them deliberate.

07:52:00 11 THE COURT: Understood. Okay. Well, I think -- does
07:52:18 12 anyone have any objection to an Allen charge at this point?
07:52:23 13 Which really is just a fancy word for "Please keep working and
07:52:27 14 give it some thought and talk to one another."

07:52:31 15 MR. UMINA: We have no objection to an Allen charge,
07:52:33 16 Your Honor.

07:52:34 17 MS. DURST: Your Honor, while it's the first note and
07:52:36 18 typically you see it a little bit later, we don't have any
07:52:39 19 objection given the time and the fact that they do have almost
07:52:42 20 three hours in deliberation in, so we have no objection to an
07:52:45 21 Allen charge.

07:52:46 22 THE COURT: Well, let me ask this, and I will make a
07:52:51 23 copy of this so you guys can look at it. My Allen charge, if
07:52:55 24 you will, does include, of course, that's probably what makes
07:52:59 25 it an Allen charge, you know, the threat of potential mistrial

07:53:03 1 if they don't reach a verdict. Are we prepared to drop that
07:53:07 2 hammer, or do we just use the warm and fuzzy portions of an
07:53:12 3 Allen charge; "Please keep an open mind and keep talking?"

07:53:17 4 In all candor, I am inclined at this point to do the
07:53:20 5 latter and avoid any mention of possible consequences if they
07:53:27 6 remained deadlocked, to be honest with you.

07:53:29 7 MS. DURST: At least from the defense's perspective,
07:53:31 8 we would propose in agreement with the Court, at least give
07:53:34 9 them the warm and fuzzy, see if we can make any further
07:53:38 10 progress with them. And then if we get another note, and they
07:53:42 11 are still deadlocked, then maybe give them additional
07:53:46 12 language.

07:53:46 13 THE COURT: Right. Any thoughts?

07:53:48 14 MR. UMINA: We are in agreement Your Honor.

07:53:49 15 THE COURT: Okay. Well, I want to make sure guys
07:53:56 16 know what we are talking about. Let me make a copy of what we
07:53:59 17 will do, and then I will show you what we would basically
07:54:08 18 scratch out.

07:54:31 19 COURT SECURITY OFFICER: Your Honor, they have
07:54:32 20 reached a verdict.

07:54:34 21 THE COURT: All right. I guess that mutes our
07:54:39 22 conversation at this point. I will ask Madam Clerk to file
07:54:46 23 that note under seal at this point. Okay.

07:54:54 24 Is everyone here, let me ask that initial question, that
07:54:57 25 needs to be here?

07:55:02 1 MS. DURST: I believe so, Your Honor. Thank you.

07:55:03 2 THE COURT: All right. So you guys know how I
07:55:10 3 handled this, we will have the jury come back in. I will ask
07:55:13 4 the foreperson if they have reached a verdict. I will ask
07:55:15 5 them if it is unanimous. I will ask them to give me the
07:55:17 6 verdict. I will review it for form. I will read the verdict.
07:55:22 7 I don't put lawyers in the position to request that the jurors
07:55:27 8 be polled. I do that sua sponte in every case to insure a
07:55:32 9 unanimous verdict. And I believe that's it.

07:55:38 10 Anything else we need to discuss before we have the jury
07:55:41 11 come back in?

07:55:42 12 MR. UMINA: Nothing from us, Your Honor.

07:55:43 13 MS. DURST: No, thank you.

07:55:44 14 THE COURT: While we are all here, if we could have
07:55:46 15 our jury, please.

07:56:39 16 (Jury returned to the courtroom, and the following
07:56:39 17 transpired in open court.)

07:56:41 18 THE COURT: Everyone may be seated.

07:56:44 19 Ladies and gentlemen of the jury, it's my understanding
07:56:46 20 after receiving the first note, that subsequent to that, you
07:56:50 21 have reached a verdict. If I could ask initially who was
07:56:55 22 serving as the foreperson? Thank you, Mr. Dawson.

07:56:59 23 Has the jury unanimously agreed upon a verdict?

07:57:04 24 JURY FOREPERSON: We have.

07:57:05 25 THE COURT: If I could ask you to hand that verdict

1 to our court security person who will give it to me, please.

2 Thank you.

3 Ladies and gentlemen of the jury, so that you are aware
4 of how this typically works, I will inspect the verdict form
5 here in a moment to make sure it's appropriate from a form
6 standpoint, which really isn't a big deal given the questions
7 posed in this case. After that, I will ask each of you
8 individually -- or actually, I will ask Madam Clerk to do
9 that -- individually if the verdict published is your verdict
10 to insure that it is a unanimous verdict; so again, just so
11 you know how that works. All right.

12 I will ask each of you to pay attention as I do publish
13 the verdict, so that when Madam Clerk polls you, you do
14 understand or know what the verdict as read here, and you can
15 confirm whether or not it is unanimous.

16 Jury verdict form returned in the matter of Rhoades v.
17 Forsyth, civil action number 1:18-cv-186. "Question one: Do
18 you find the plaintiff has proven by a preponderance of the
19 evidence that the force used by Defendant Forsyth toward
20 Philip Jontz Rhoades on August 2nd, 2017 was excessive and
21 objectively unreasonable?" The jury has answered "No." And
22 the verdict form is signed April 9, 2021, today's date and
23 signed by Michael Dawson.

24 Madam Clerk, if I could ask you to poll the jurors,
25 please, ma'am.

07:58:51 1 THE CLERK: I will call you by your number. Just
07:58:53 2 answer "Yes or No."
07:58:54 3 Juror number one, is this your verdict?
4 JUROR NO. 1: Yes.
5 THE CLERK: Juror number two, is this your verdict?
6 JUROR NO. 2: Yes.
7 THE CLERK: Juror number three, is this your verdict?
8 JUROR NO. 3: Yes.
9 THE CLERK: Juror number four, is this your verdict?
10 JUROR NO. 4: Yes.
11 THE CLERK: Juror number five, is this your verdict?
12 JUROR NO. 5: Yes.
13 THE CLERK: Juror number six, is this your verdict?
14 JUROR NO. 6: Yes.
15 THE CLERK: Juror number seven, is this your verdict?
16 JUROR NO. 7: Yes.
17 THE CLERK: Juror number eight, is this your verdict?
07:59:18 18 JUROR NO. 8: Yes.
07:59:19 19 THE COURT: Finding the verdict to be unanimous, the
07:59:22 20 Court will ask Madam Clerk to file the verdict form.
07:59:29 21 Ladies and gentlemen of the jury, I cannot thank you
07:59:32 22 enough for your time and your service during this trial,
07:59:35 23 particularly working into the evening on a Friday. I speak on
07:59:39 24 behalf of everyone who was involved in this trial that we
07:59:41 25 certainly appreciate your willingness to serve and all of the

07:59:45 1 hard work that you put in.

07:59:47 2 This has ended and will conclude your jury service here,
07:59:50 3 so I am pleased to welcome you to depart the courtroom.
07:59:54 4 Report back to your jury room. I recognize the late hour. If
07:59:58 5 you have five minutes, I would appreciate if you could hang
08:00:01 6 there for a second so I can chat with you for a moment. If
08:00:04 7 you don't, please feel free to go. Either way, we thank you
08:00:08 8 very much for your service, and you are free to go. Thank
08:00:08 9 you.

08:00:29 10 (Jury excused, and the following transpired in open
08:00:30 11 court.)

08:00:31 12 THE COURT: Everyone thank you. Please be seated.
08:00:35 13 It won't happen today, but the Court will enter the
08:00:37 14 appropriate judgment order, along with the verdict. Given the
08:00:41 15 late hour on a Friday, I won't ask folks when they anticipate
08:00:45 16 or desire to file post trial motions. The Court will enter
08:00:49 17 the order on Monday, asking to advise when you want the
08:00:51 18 deadline set down the road.

08:00:55 19 Anything else we need to take up at this point?

08:00:58 20 MR. UMINA: No. Thank you, Your Honor.

08:00:59 21 THE COURT: Ms. Durst.

08:01:00 22 MS. DURST: No, Your Honor. Thank you.

08:01:02 23 THE COURT: We shall stand adjourned. Thank you all
08:01:03 24 very much.

25 (Trial in this matter was concluded at this time 8:01

1 p.m.)

2 C E R T I F I C A T E

3 I, Jill M. Cutter, Registered Professional Reporter and
4 Official Reporter for the United States District Court for the
5 Northern District of West Virginia, so hereby certify that the
6 foregoing is a correct transcript to the best of my ability of
7 the proceedings in the above-styled action on April 9, 2021,
8 as reported by me in stenotypy.

9 I certify that the transcript fees and format comply with
10 those prescribed by the Court and Judicial conference of the
11 United States.

12 Given under by hand this day, April 26, 2021.

13
14 /s/ Jill M. Cutter, RPR

15 Official Reporter, United States
16 US District Court for the Northern
US District of West Virginia

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Jill M. Cutter, RPR

500 W. Pike Street, Clarksburg, WV 26301 (304) 622-8513

\$	792:25, 795:4, 795:7, 795:12, 795:16, 795:19, 795:21, 795:23, 796:2, 796:5 16-second [3] - 610:4, 706:8, 711:3 165 [1] - 716:5 17 [6] - 718:14, 718:18, 722:13, 723:3, 726:19, 726:25 18 [1] - 718:20 180 [1] - 691:8 19 [3] - 681:5, 715:6, 721:8 190 [1] - 612:5 1983 [11] - 609:17, 617:10, 618:8, 618:13, 618:23, 629:24, 720:16, 727:8, 727:15, 728:1, 728:19 1987 [1] - 644:17 1989 [1] - 644:17 1990 [1] - 631:21 1993 [1] - 612:6 1:00 [3] - 715:1, 715:4, 715:14 1:02 [1] - 715:16 1:07-CV-47 [1] - 612:16 1:18-CV-186 [1] - 607:4 1:18-cv-186 [2] - 609:5, 833:17 1:30 [3] - 714:7, 714:9, 714:16 1:35 [1] - 738:25 1:54 [1] - 738:25 1A [2] - 759:20, 759:24 1B [2] - 760:8, 760:9	652:15 2000 [4] - 635:8, 682:25, 683:8, 685:1 2001 [1] - 683:13 2003 [1] - 635:10 2006 [1] - 635:15 2008 [2] - 612:17, 612:18 2009 [1] - 669:22 2013 [1] - 820:11 2014 [1] - 820:11 2017 [17] - 609:25, 623:8, 648:2, 674:24, 676:15, 679:21, 703:2, 712:17, 759:17, 770:20, 783:14, 788:19, 789:1, 797:20, 801:20, 817:16, 833:20 2018 [1] - 789:2 2019 [4] - 640:23, 642:3, 802:3, 808:6 2020 [3] - 648:3, 648:7, 717:1 2021 [5] - 607:12, 761:5, 833:22, 836:7, 836:12 212 [1] - 793:1 212-foot [1] - 710:17 213 [3] - 660:12, 705:24, 767:22 22 [3] - 665:12, 725:20, 732:14 23 [1] - 725:20 2414 [1] - 607:23 25 [7] - 647:20, 661:19, 665:13, 666:10, 685:25, 716:5, 769:5 250 [3] - 621:23, 640:3, 813:6 25th [7] - 622:24, 623:1, 623:3, 623:8, 623:17, 624:5, 720:11 26 [1] - 836:12 26501 [1] - 607:16 26508 [2] - 607:19, 607:23 27 [1] - 814:25 28 [4] - 771:18, 782:19, 788:18, 788:20 280 [2] - 652:13, 816:11 29.33 [1] - 665:13 2:30 [1] - 763:3 2:39 [1] - 763:3 2:43 [1] - 662:17	2:43:04 [3] - 792:5, 792:10, 793:16 2A [3] - 760:21, 760:25, 761:1 2E [1] - 646:5 2nd [12] - 609:25, 619:12, 643:10, 673:15, 801:20, 813:21, 814:23, 817:16, 818:14, 819:1, 821:25, 833:20	736:6, 738:3, 766:22, 772:17 50-mile [1] - 767:13 50-yard [1] - 780:23 506 [1] - 725:9 51-yard [1] - 764:9 52 [3] - 614:25, 765:6, 781:3 55-2-12(b) [1] - 612:4 55-7-29 [3] - 728:5, 728:23, 728:25 55-7-8(a) [1] - 612:24 5729 [1] - 718:17 58447 [1] - 612:17 5:08 [1] - 829:11
'		3	6	
'21 [1] - 716:5		3 [1] - 834:8 30 [10] - 609:20, 630:21, 637:8, 701:21, 706:18, 735:19, 735:20, 793:4, 828:3 300 [1] - 763:22 33 [1] - 674:14 36.6 [1] - 666:10 36.67 [1] - 665:14 360 [1] - 691:10 37 [1] - 655:14 3:45 [1] - 789:25 3:53 [1] - 789:25	6 [2] - 607:19, 834:14 6'6 [1] - 652:13 6-foot [1] - 652:15 60 [2] - 630:24, 631:1	
/		4	7	
/s [1] - 836:14		4 [3] - 662:17, 676:15, 834:10 4,400 [2] - 711:13, 794:5 40 [3] - 704:6, 735:14, 735:21 40-caliber [2] - 616:3, 824:18 400 [3] - 685:21, 685:24, 686:23 400-plus [1] - 767:1 45 [4] - 674:14, 712:7, 727:18, 735:19 450 [5] - 632:2, 632:3, 632:10, 685:17, 686:4 461 [1] - 609:20	7 [1] - 834:16 70 [5] - 652:13, 686:7, 686:24, 766:22, 772:17 70,000 [1] - 647:6 72 [1] - 652:14 7:50 [1] - 829:11	
0		5	8	
0.70 [1] - 665:21 0.75 [1] - 665:22		5 [2] - 682:22, 834:12 50 [18] - 608:2, 609:9, 613:8, 613:13, 613:20, 661:21, 686:7, 686:23, 690:9, 715:21, 717:14, 723:16, 723:18, 736:1,	8 [2] - 734:22, 834:18 8:01 [1] - 835:25	
1	2		9	
1 [3] - 645:19, 778:14, 834:4 1.2 [1] - 665:25 1.35 [1] - 665:25 10 [8] - 645:20, 681:5, 682:22, 726:19, 735:15, 772:18, 772:19, 810:7 100 [4] - 805:3, 805:17, 808:10, 819:16 101 [1] - 717:1 103 [1] - 725:9 11 [1] - 718:2 11:03 [1] - 680:25 11:20 [1] - 680:9 11:28 [1] - 680:25 12 [1] - 718:3 125 [1] - 607:16 126 [1] - 612:6 12:17 [1] - 715:16 13 [4] - 718:6, 719:16, 721:8 14 [3] - 623:5, 717:1, 718:8 14.6 [1] - 666:9 14.67 [1] - 665:11 1443:04 [1] - 792:5 15 [7] - 661:18, 665:11, 680:8, 680:14, 718:10, 735:15, 810:7 15-hour [1] - 638:11 15-minute [1] - 680:22 16 [19] - 657:9, 706:7, 718:12, 724:19, 736:20, 791:23, 792:11, 792:15,	2 [12] - 674:24, 679:21, 703:2, 712:17, 730:13, 733:20, 734:23, 759:17, 770:20, 783:14, 797:20, 834:6 2,500 [1] - 647:21 2.5 [2] - 666:3, 666:8 20 [7] - 649:2, 665:12, 682:22, 686:25, 772:18, 772:19, 827:24 20/20 [3] - 667:17, 750:3, 822:12 200 [2] - 607:19,		9 [6] - 607:12, 726:19, 734:23, 761:5, 833:22, 836:7 9-11 [9] - 683:5, 683:10, 683:13, 684:14, 685:3, 712:22, 781:19, 781:20 90 [2] - 666:4, 685:18 911 [1] - 801:13 95 [2] - 666:5, 685:18 9:09 [1] - 609:1 9:34 [1] - 626:13 9:42 [1] - 626:13	
			A	
			a.m [3] - 609:1, 626:13 ability [3] - 678:2, 806:18, 836:6	

<p>able [21] - 625:12, 625:14, 639:16, 647:3, 648:23, 649:24, 659:3, 663:23, 667:21, 775:20, 775:21, 775:22, 779:4, 788:6, 795:17, 802:22, 811:20, 820:22, 820:23</p> <p>above-styled [2] - 607:12, 836:7</p> <p>absent [1] - 779:9</p> <p>absolute [2] - 804:24, 805:2</p> <p>absolutely [17] - 638:12, 638:16, 649:25, 656:18, 673:21, 678:4, 685:8, 685:16, 708:13, 769:9, 794:19, 797:17, 799:7, 808:11, 811:1, 817:2, 823:8</p> <p>academies [2] - 630:16, 816:21</p> <p>Academy [7] - 628:6, 628:13, 628:14, 628:19, 629:15, 629:18, 793:7</p> <p>academy [7] - 628:21, 628:24, 629:1, 631:1, 644:16, 644:17, 793:5</p> <p>Academy's [1] - 629:18</p> <p>accelerate [1] - 765:12</p> <p>accelerating [15] - 697:5, 698:16, 710:24, 765:1, 765:14, 765:23, 766:3, 767:22, 768:5, 771:11, 771:12, 772:9, 773:22, 780:17, 824:25</p> <p>accept [3] - 634:1, 745:1, 747:4</p> <p>acceptable [5] - 646:18, 650:25, 652:8, 652:24, 653:4</p> <p>access [28] - 622:2, 660:2, 662:12, 662:14, 662:19, 663:9, 663:18, 669:9, 674:10, 679:5, 679:8, 792:15, 792:19, 793:1, 793:18, 796:4, 803:16,</p>	<p>806:21, 806:24, 807:2, 807:3, 807:5, 814:2, 815:15, 816:3</p> <p>accident [2] - 638:8, 675:12</p> <p>accidents [1] - 675:11</p> <p>accordance [1] - 743:12</p> <p>account [1] - 698:5</p> <p>accuracy [1] - 700:17</p> <p>accurate [4] - 620:10, 694:18, 722:19, 726:14</p> <p>accusations [1] - 790:21</p> <p>achievable [1] - 666:4</p> <p>acknowledge [8] - 682:9, 683:13, 698:7, 699:11, 703:14, 704:5, 706:3, 754:11</p> <p>acknowledged [1] - 775:4</p> <p>acknowledging [1] - 699:5</p> <p>acquainted [1] - 628:20</p> <p>act [9] - 644:25, 668:3, 668:6, 686:14, 702:18, 736:14, 752:2, 752:8, 755:16</p> <p>acted [10] - 644:25, 702:7, 702:12, 702:19, 702:21, 748:10, 748:24, 755:17, 771:2, 774:8</p> <p>acting [6] - 651:4, 740:23, 748:6, 748:25, 755:11, 755:21</p> <p>ACTION [1] - 607:4</p> <p>action [31] - 607:12, 609:17, 645:17, 645:19, 645:20, 649:19, 650:5, 650:13, 651:19, 651:24, 652:3, 652:4, 652:20, 652:22, 653:8, 672:9, 728:10, 728:12, 729:16, 740:10, 741:21, 741:25, 751:24, 751:25, 752:4, 752:11, 791:15, 822:16, 833:17, 836:7</p> <p>actions [37] - 611:8, 615:9, 615:11, 619:12, 626:1,</p>	<p>633:1, 651:4, 668:18, 671:11, 672:10, 673:7, 673:15, 674:22, 674:24, 675:3, 679:20, 699:23, 701:22, 712:16, 721:20, 728:14, 736:8, 737:15, 737:19, 750:7, 754:17, 756:15, 758:1, 784:22, 790:13, 794:16, 795:13, 813:20, 813:23, 817:17, 819:1</p> <p>active [5] - 633:23, 684:11, 684:20, 713:5, 813:13</p> <p>actively [2] - 655:2, 749:23</p> <p>actor [3] - 620:7, 753:25, 764:4</p> <p>acts [2] - 748:16, 749:10</p> <p>actual [11] - 618:5, 660:22, 660:24, 679:6, 731:17, 753:10, 754:10, 754:12, 755:16, 797:17</p> <p>add [10] - 615:5, 719:21, 719:24, 723:2, 726:18, 727:23, 728:4, 767:5, 767:23, 802:1</p> <p>addition [8] - 624:14, 637:3, 744:11, 745:20, 755:13, 755:24, 759:8, 782:4</p> <p>additional [7] - 619:5, 644:1, 801:9, 801:25, 802:2, 808:17, 831:11</p> <p>additionally [5] - 614:22, 620:22, 621:9, 752:25, 774:4</p> <p>address [18] - 616:19, 620:2, 623:21, 659:3, 718:25, 719:10, 723:15, 724:18, 725:18, 726:24, 730:6, 730:12, 733:15, 819:7, 819:19, 819:20, 819:24, 821:16</p> <p>addressed [1] - 719:6</p> <p>addressing [1] - 612:22</p>	<p>adequately [2] - 756:14, 757:3</p> <p>adjourned [1] - 835:23</p> <p>adjustment [1] - 627:8</p> <p>Administratrix [1] - 607:4</p> <p>administratrix [1] - 748:4</p> <p>admissible [1] - 745:24</p> <p>admit [3] - 635:22, 668:11, 824:1</p> <p>admitted [5] - 668:10, 741:4, 811:15, 821:6</p> <p>admittedly [1] - 727:17</p> <p>adopted [3] - 716:17, 718:11</p> <p>adult [1] - 629:25</p> <p>advance [1] - 773:12</p> <p>advancing [1] - 823:10</p> <p>advice [2] - 754:2, 788:8</p> <p>advise [5] - 676:22, 735:6, 829:16, 829:18, 835:17</p> <p>advised [5] - 623:19, 623:23, 677:4, 677:5, 819:4</p> <p>advising [2] - 625:13, 646:23</p> <p>advocates [1] - 626:1</p> <p>aerosol [1] - 629:11</p> <p>affect [3] - 678:1, 748:19, 806:19</p> <p>affected [4] - 610:15, 745:7, 785:10, 785:22</p> <p>affidavit [1] - 635:23</p> <p>affliction [1] - 717:25</p> <p>afraid [2] - 657:25, 658:2</p> <p>afternoon [1] - 609:25</p> <p>afterwards [5] - 635:7, 642:14, 668:14, 691:17, 705:22</p> <p>age [4] - 631:1, 788:4, 821:4</p> <p>agency [2] - 628:9, 704:9</p> <p>agents [1] - 629:11</p> <p>ages [1] - 788:9</p> <p>aggression [2] - 649:7, 651:1</p> <p>aggressive [2] - 672:4, 709:24</p> <p>aggressively [6] - 698:16, 710:6, 710:24, 765:1,</p>	<p>765:14, 823:10</p> <p>ago [3] - 686:7, 774:6, 774:12</p> <p>agree [39] - 651:8, 651:16, 651:17, 654:12, 656:10, 677:24, 678:8, 687:6, 688:24, 689:3, 692:6, 692:15, 692:16, 692:20, 692:24, 694:23, 695:5, 695:13, 695:22, 695:25, 697:8, 703:21, 704:18, 704:22, 706:8, 709:16, 709:23, 711:7, 711:15, 713:3, 726:2, 728:9, 732:1, 736:10, 758:13, 770:10, 796:9, 796:15</p> <p>agreed [7] - 702:5, 702:10, 702:25, 703:4, 748:10, 761:11, 832:23</p> <p>agreeing [1] - 689:12</p> <p>agreement [6] - 758:16, 761:7, 829:16, 830:10, 831:8, 831:14</p> <p>ahead [10] - 620:14, 622:5, 639:21, 654:2, 660:1, 683:17, 724:21, 736:4, 792:4, 803:4</p> <p>ahold [2] - 800:7, 829:8</p> <p>aid [1] - 747:19</p> <p>aided [1] - 607:25</p> <p>airport [4] - 654:18, 682:24, 684:3, 713:6</p> <p>Airport [1] - 684:1</p> <p>Alabama [1] - 787:7</p> <p>alert [1] - 827:5</p> <p>Alford [1] - 610:10</p> <p>aligned [3] - 696:13, 779:1, 824:24</p> <p>allegations [1] - 699:23</p> <p>allege [1] - 677:1</p> <p>alleged [5] - 612:8, 612:10, 617:7, 737:11, 798:23</p> <p>allegedly [2] - 699:9, 710:1</p> <p>Allegiance [1] - 795:18</p> <p>alleging [1] - 612:20</p> <p>Allen [7] - 829:20,</p>
---	---	---	---	---

<p>830:12, 830:15, 830:21, 830:23, 830:25, 831:3 allow [5] - 684:7, 684:9, 684:18, 709:7, 827:11 allowed [7] - 746:16, 753:6, 780:9, 780:12, 784:14, 786:22 allows [1] - 612:24 almost [23] - 621:24, 624:3, 624:8, 625:3, 647:13, 655:25, 656:23, 658:21, 661:12, 663:25, 671:20, 671:24, 680:10, 699:14, 703:9, 723:1, 731:1, 785:21, 814:6, 816:10, 816:11, 818:4, 830:19 alone [3] - 628:13, 740:14, 770:20 alongside [1] - 705:7 alphabet [2] - 795:22, 795:23 altered [3] - 658:15, 679:17, 712:12 altering [1] - 715:8 alternative [1] - 619:4 ambulance [12] - 657:15, 660:10, 663:9, 663:10, 674:8, 674:9, 674:14, 704:12, 815:24, 816:2, 816:3 amended [1] - 716:4 Amendment [1] - 778:3 America [9] - 614:11, 763:17, 776:4, 778:2, 779:20, 780:6, 782:25, 784:6, 788:22 American [1] - 666:2 ammunition [1] - 636:24 amount [24] - 645:18, 650:18, 731:3, 734:8, 743:16, 748:18, 749:12, 751:2, 751:7, 752:14, 755:19, 756:3, 756:6, 757:2, 757:24, 758:2, 758:7, 758:8, 760:7, 760:11, 760:24, 761:2, 795:24, 796:3 amounts [1] - 760:1</p>	<p>analysis [8] - 663:14, 672:20, 673:23, 702:1, 702:23, 706:1, 723:2, 738:11 analyze [2] - 675:11, 675:13 analyzing [1] - 707:22 anatomic [1] - 776:6 anatomical [1] - 776:17 angle [1] - 776:11 anguish [8] - 731:4, 731:12, 733:9, 734:9, 753:23, 754:1, 760:3, 783:23 anonymous [1] - 646:3 answer [25] - 638:21, 645:21, 687:19, 690:1, 690:15, 694:17, 706:13, 744:1, 759:19, 759:20, 760:20, 760:23, 761:1, 772:20, 783:17, 784:19, 791:20, 796:16, 801:8, 808:8, 818:24, 819:2, 819:15, 820:7, 834:2 answered [4] - 692:4, 808:15, 810:23, 833:21 answering [1] - 761:8 answers [1] - 692:15 Anthony [1] - 645:25 anticipate [4] - 714:19, 715:8, 735:14, 835:15 anticipated [1] - 790:10 anticipating [2] - 618:1, 731:21 anyway [3] - 671:9, 681:15, 724:8 apart [1] - 723:18 apologies [1] - 739:16 apologize [2] - 725:17, 734:18 appeal [1] - 724:2 APPEARANCES [1] - 607:14 appeared [1] - 622:9 appendages [1] - 731:3 Apple [1] - 646:4 apple [1] - 825:25 applicable [4] - 609:21, 614:4, 718:17, 740:10</p>	<p>application [7] - 661:5, 683:25, 684:16, 685:2, 738:6, 781:18, 781:21 applied [2] - 749:18, 781:20 applies [4] - 718:10, 741:13, 750:5, 828:16 apply [9] - 643:25, 665:21, 666:1, 727:3, 728:22, 728:25, 740:12, 740:19, 746:25 applying [2] - 662:5, 741:8 appointments [3] - 733:25, 820:15 appreciate [4] - 732:12, 790:18, 834:25, 835:5 approach [1] - 689:22 approaching [2] - 663:23, 666:20 appropriate [12] - 613:14, 626:1, 722:23, 724:7, 724:12, 731:6, 756:22, 756:23, 756:24, 762:25, 833:5, 835:14 appropriately [1] - 617:19 approximate [1] - 632:10 April [5] - 607:12, 761:5, 833:22, 836:7, 836:12 area [17] - 640:12, 651:5, 651:7, 651:13, 652:11, 655:24, 690:10, 691:8, 695:14, 767:16, 767:18, 793:17, 794:24, 795:2, 813:6, 814:16, 818:3 arena [2] - 816:8, 816:12 arguably [1] - 734:8 argue [3] - 733:18, 733:24, 807:21 argued [1] - 615:7 arguing [2] - 733:9, 733:10 ARGUMENT [1] - 608:7 argument [28] - 611:9, 615:12, 616:13,</p>	<p>616:18, 625:20, 697:23, 698:20, 705:18, 707:11, 725:8, 728:8, 731:12, 733:16, 737:5, 743:15, 743:19, 762:2, 788:2, 789:19, 791:3, 800:1, 802:10, 807:15, 819:8, 820:21, 821:2, 823:5, 824:22 arguments [9] - 616:20, 732:11, 733:6, 734:2, 739:25, 743:14, 761:25, 762:5, 762:15 arising [2] - 612:1, 727:8 armed [20] - 621:6, 657:1, 658:23, 664:16, 670:9, 670:22, 671:5, 671:6, 711:8, 711:11, 711:12, 736:22, 794:7, 795:14, 796:10, 813:5, 814:1, 818:5 arms [2] - 775:21, 805:6 Army [1] - 787:6 arranging [1] - 800:25 arrest [5] - 748:19, 748:20, 749:13, 749:14, 749:24 arrested [1] - 635:17 arrive [2] - 741:8, 757:2 arrived [2] - 800:15, 816:1 arriving [1] - 663:23 articulated [2] - 732:20, 822:3 artist [2] - 650:22, 652:12 ascertain [2] - 663:23, 667:21 aside [4] - 618:13, 629:21, 678:6, 762:14 aspect [3] - 618:12, 636:5, 761:20 aspects [2] - 715:7, 753:11 assault [1] - 650:25 assessed [2] - 720:9, 822:6 assessing [2] - 753:18, 756:10</p>	<p>assessment [1] - 720:8 assign [1] - 695:9 assist [3] - 643:18, 683:6, 746:20 assistance [5] - 631:10, 733:4, 734:16, 760:6, 784:7 assisted [1] - 813:18 Association [2] - 666:2, 676:22 assume [1] - 767:20 assuming [1] - 684:4 assumption [1] - 674:11 assured [1] - 791:6 AT [1] - 607:2 atrocious [2] - 619:6, 619:12 attached [1] - 609:19 attack [1] - 823:2 attempt [9] - 645:17, 707:18, 710:20, 721:13, 751:16, 753:12, 776:1, 785:18, 827:13 attempted [7] - 623:7, 625:3, 700:9, 708:10, 720:19, 751:13, 756:15 attempting [14] - 621:11, 622:23, 624:8, 624:18, 648:19, 659:12, 698:24, 700:20, 707:17, 748:19, 749:13, 777:5, 784:2 attended [1] - 793:5 attention [8] - 677:19, 725:21, 749:3, 749:20, 761:17, 780:7, 821:13, 833:12 attentiveness [1] - 790:15 Attorney [7] - 627:24, 628:5, 630:17, 631:23, 644:19, 645:24, 646:10 attorney [2] - 790:17, 799:6 attorneys [4] - 632:16, 633:10, 743:14, 786:4 audible [2] - 751:18, 814:8 audio [5] - 642:18, 792:6, 792:9, 793:19, 793:23 August [22] - 609:25,</p>
--	--	--	---	---

<p>619:12, 643:10, 673:15, 674:24, 676:15, 679:21, 703:2, 712:17, 759:17, 770:20, 783:14, 788:19, 797:20, 801:20, 813:21, 814:23, 817:16, 818:14, 819:1, 821:25, 833:20 Austin [1] - 607:17 Authority [1] - 712:21 authorized [1] - 695:4 automatic [1] - 618:9 automatically [1] - 757:12 available [8] - 648:21, 648:25, 653:22, 693:25, 754:17, 817:25, 822:14, 829:6 average [1] - 650:20 avoid [3] - 674:16, 674:18, 831:5 award [26] - 725:1, 725:4, 725:11, 725:14, 726:9, 732:7, 732:8, 752:14, 752:22, 754:7, 754:13, 755:14, 755:19, 755:23, 756:2, 756:4, 756:24, 757:21, 758:9, 760:8, 760:10, 760:11, 760:12, 782:18, 821:19 awarded [6] - 755:12, 755:24, 756:18, 757:6, 758:10 awarding [1] - 754:21 awards [1] - 754:24 aware [4] - 670:3, 687:12, 697:1, 833:3</p>	<p>785:23, 825:6, 825:12, 825:24, 825:25 badge [1] - 825:12 badly [1] - 791:5 bail [1] - 669:1 Bailey [1] - 607:18 bailiff [1] - 628:11 balanced [2] - 742:4, 742:19 ball [1] - 820:2 Bam [1] - 814:17 bar [1] - 715:13 bars [1] - 728:2 base [3] - 701:14, 741:1, 741:3 based [42] - 610:19, 645:11, 645:16, 651:21, 652:23, 667:21, 671:18, 673:2, 682:15, 691:18, 697:12, 698:5, 701:3, 707:19, 707:24, 711:15, 712:15, 723:7, 725:25, 732:16, 733:16, 737:17, 738:7, 756:25, 757:1, 757:21, 764:12, 764:15, 767:14, 781:2, 782:9, 785:19, 786:23, 788:1, 801:11, 813:19, 816:25, 817:11, 817:15, 818:21, 822:13 basic [4] - 630:15, 763:15, 778:1, 780:5 basing [2] - 693:19, 826:18 basis [10] - 613:7, 617:8, 617:18, 618:14, 619:4, 653:18, 701:15, 709:24, 726:12, 749:16 batons [1] - 629:12 bear [3] - 745:5, 756:6, 756:8 bearing [1] - 720:11 became [5] - 628:20, 628:25, 630:2, 634:2, 665:7 began [1] - 765:14 begin [9] - 680:4, 690:1, 740:1, 762:6, 788:17, 814:24, 828:11, 828:16, 828:20</p>	<p>beginning [6] - 724:23, 739:23, 764:8, 790:11, 792:15, 823:2 begins [2] - 710:24, 710:25 behalf [6] - 610:3, 626:23, 631:17, 632:7, 719:5, 834:24 behavior [2] - 618:16, 827:11 behind [16] - 614:2, 624:15, 644:8, 655:14, 671:8, 672:18, 695:17, 696:14, 697:10, 701:15, 705:14, 737:2, 739:16, 773:23, 825:18 beings [1] - 763:23 belief [1] - 624:18 believability [1] - 746:13 believes [1] - 757:5 belittle [1] - 785:16 bell [1] - 736:10 belonged [1] - 619:3 below [3] - 719:22, 761:2, 775:22 belt [2] - 633:19, 671:3 benefit [1] - 826:16 Benjamin [1] - 607:18 best [6] - 611:13, 659:5, 686:8, 737:17, 768:13, 836:6 better [10] - 611:12, 615:14, 640:14, 666:16, 684:7, 684:9, 684:18, 729:20, 740:5, 795:9 between [15] - 660:7, 728:14, 735:19, 741:21, 743:10, 745:11, 756:17, 795:5, 796:11, 799:22, 806:2, 806:22, 807:7, 810:1, 810:3 beyond [1] - 764:14 bias [1] - 741:14 biased [1] - 687:7 big [3] - 798:3, 800:1, 833:6 binding [1] - 616:8 bird [1] - 805:1 birthday [1] - 820:2 bit [19] - 617:25, 628:17, 629:22, 631:19, 633:16,</p>	<p>640:20, 641:10, 644:6, 653:12, 673:12, 694:14, 710:9, 783:25, 784:9, 790:10, 795:19, 805:25, 812:12, 830:18 black [8] - 633:19, 647:15, 721:12, 769:12, 780:13, 781:14, 813:3, 813:12 bleeding [1] - 731:4 blink [1] - 826:25 block [1] - 671:8 blood [1] - 677:1 blue [2] - 651:11, 651:13 bluish [2] - 651:6, 652:10 board [1] - 777:9 bodily [6] - 621:11, 622:10, 622:15, 659:11, 778:12, 778:13 body [9] - 645:12, 645:15, 668:3, 677:2, 677:15, 775:22, 776:16, 805:10, 826:25 book [2] - 649:14, 764:11 born [1] - 786:2 borrowed [1] - 727:7 boss [3] - 769:2, 769:4, 769:5 bought [2] - 646:4, 768:16 bounce [1] - 795:16 bowl [16] - 663:20, 663:24, 664:6, 664:10, 664:21, 666:20, 666:22, 667:1, 667:10, 667:20, 669:17, 671:12, 772:8, 773:20, 792:14, 814:4 box [5] - 670:23, 711:5, 711:16, 711:17, 819:17 boys [4] - 788:4, 820:10, 820:16, 820:24 brain [2] - 637:25, 638:4 brake [2] - 666:11, 710:19 Branham [47] - 642:20, 642:25,</p>	<p>643:3, 663:5, 675:10, 678:10, 678:18, 693:4, 693:10, 699:4, 701:4, 701:12, 701:16, 708:23, 709:8, 709:11, 768:11, 768:16, 768:20, 769:13, 769:16, 769:18, 774:22, 774:24, 775:3, 775:15, 798:2, 799:3, 799:13, 799:24, 800:4, 800:12, 800:16, 800:21, 801:22, 802:5, 805:25, 807:10, 808:3, 810:14, 812:5, 812:7, 815:25, 816:6, 823:25, 825:3 Branham's [4] - 678:16, 700:21, 709:14, 800:19 break [17] - 626:11, 626:13, 665:21, 666:3, 666:7, 680:4, 680:7, 680:22, 714:3, 714:9, 714:25, 735:10, 739:25, 761:24, 761:25, 789:10, 789:19 Break [2] - 763:3, 789:25 breath [2] - 680:9, 714:25 brief [3] - 761:23, 762:4, 828:14 briefed [1] - 614:4 Briefly [1] - 684:1 briefly [2] - 637:18, 712:3 bright [2] - 644:12, 644:17 bright-line [2] - 644:12, 644:17 bring [5] - 630:7, 738:21, 761:16, 798:22, 821:13 bringing [1] - 698:10 brings [5] - 634:15, 742:9, 742:10, 742:23, 788:25 broke [2] - 780:4, 783:1 broken [6] - 824:6, 824:7, 824:9, 824:15, 824:16,</p>
B				
<p>backed [3] - 674:18, 771:10, 824:22 background [2] - 633:21, 644:6 backing [1] - 669:23 backs [1] - 710:19 backwards [2] - 636:17, 826:7 bad [14] - 687:23, 706:9, 706:11, 711:3, 767:11, 782:7, 782:14,</p>	<p>batons [1] - 629:12 bear [3] - 745:5, 756:6, 756:8 bearing [1] - 720:11 became [5] - 628:20, 628:25, 630:2, 634:2, 665:7 began [1] - 765:14 begin [9] - 680:4, 690:1, 740:1, 762:6, 788:17, 814:24, 828:11, 828:16, 828:20</p>	<p>beginning [6] - 724:23, 739:23, 764:8, 790:11, 792:15, 823:2 begins [2] - 710:24, 710:25 behalf [6] - 610:3, 626:23, 631:17, 632:7, 719:5, 834:24 behavior [2] - 618:16, 827:11 behind [16] - 614:2, 624:15, 644:8, 655:14, 671:8, 672:18, 695:17, 696:14, 697:10, 701:15, 705:14, 737:2, 739:16, 773:23, 825:18 beings [1] - 763:23 belief [1] - 624:18 believability [1] - 746:13 believes [1] - 757:5 belittle [1] - 785:16 bell [1] - 736:10 belonged [1] - 619:3 below [3] - 719:22, 761:2, 775:22 belt [2] - 633:19, 671:3 benefit [1] - 826:16 Benjamin [1] - 607:18 best [6] - 611:13, 659:5, 686:8, 737:17, 768:13, 836:6 better [10] - 611:12, 615:14, 640:14, 666:16, 684:7, 684:9, 684:18, 729:20, 740:5, 795:9 between [15] - 660:7, 728:14, 735:19, 741:21, 743:10, 745:11, 756:17, 795:5, 796:11, 799:22, 806:2, 806:22, 807:7, 810:1, 810:3 beyond [1] - 764:14 bias [1] - 741:14 biased [1] - 687:7 big [3] - 798:3, 800:1, 833:6 binding [1] - 616:8 bird [1] - 805:1 birthday [1] - 820:2 bit [19] - 617:25, 628:17, 629:22, 631:19, 633:16,</p>	<p>640:20, 641:10, 644:6, 653:12, 673:12, 694:14, 710:9, 783:25, 784:9, 790:10, 795:19, 805:25, 812:12, 830:18 black [8] - 633:19, 647:15, 721:12, 769:12, 780:13, 781:14, 813:3, 813:12 bleeding [1] - 731:4 blink [1] - 826:25 block [1] - 671:8 blood [1] - 677:1 blue [2] - 651:11, 651:13 bluish [2] - 651:6, 652:10 board [1] - 777:9 bodily [6] - 621:11, 622:10, 622:15, 659:11, 778:12, 778:13 body [9] - 645:12, 645:15, 668:3, 677:2, 677:15, 775:22, 776:16, 805:10, 826:25 book [2] - 649:14, 764:11 born [1] - 786:2 borrowed [1] - 727:7 boss [3] - 769:2, 769:4, 769:5 bought [2] - 646:4, 768:16 bounce [1] - 795:16 bowl [16] - 663:20, 663:24, 664:6, 664:10, 664:21, 666:20, 666:22, 667:1, 667:10, 667:20, 669:17, 671:12, 772:8, 773:20, 792:14, 814:4 box [5] - 670:23, 711:5, 711:16, 711:17, 819:17 boys [4] - 788:4, 820:10, 820:16, 820:24 brain [2] - 637:25, 638:4 brake [2] - 666:11, 710:19 Branham [47] - 642:20, 642:25,</p>	<p>643:3, 663:5, 675:10, 678:10, 678:18, 693:4, 693:10, 699:4, 701:4, 701:12, 701:16, 708:23, 709:8, 709:11, 768:11, 768:16, 768:20, 769:13, 769:16, 769:18, 774:22, 774:24, 775:3, 775:15, 798:2, 799:3, 799:13, 799:24, 800:4, 800:12, 800:16, 800:21, 801:22, 802:5, 805:25, 807:10, 808:3, 810:14, 812:5, 812:7, 815:25, 816:6, 823:25, 825:3 Branham's [4] - 678:16, 700:21, 709:14, 800:19 break [17] - 626:11, 626:13, 665:21, 666:3, 666:7, 680:4, 680:7, 680:22, 714:3, 714:9, 714:25, 735:10, 739:25, 761:24, 761:25, 789:10, 789:19 Break [2] - 763:3, 789:25 breath [2] - 680:9, 714:25 brief [3] - 761:23, 762:4, 828:14 briefed [1] - 614:4 Briefly [1] - 684:1 briefly [2] - 637:18, 712:3 bright [2] - 644:12, 644:17 bright-line [2] - 644:12, 644:17 bring [5] - 630:7, 738:21, 761:16, 798:22, 821:13 bringing [1] - 698:10 brings [5] - 634:15, 742:9, 742:10, 742:23, 788:25 broke [2] - 780:4, 783:1 broken [6] - 824:6, 824:7, 824:9, 824:15, 824:16,</p>

824:19 brother [3] - 771:4, 787:7 brothers [1] - 754:4 brought [5] - 739:18, 751:23, 752:18, 784:24, 828:15 Brown [1] - 607:22 buckets [2] - 726:7 Buckhannon [1] - 771:24 buddies [1] - 787:6 building [1] - 829:7 bulk [1] - 728:3 bullet [19] - 766:18, 773:16, 776:9, 776:14, 776:18, 777:2, 777:3, 777:7, 777:10, 784:5, 802:23, 803:1, 803:2, 803:10, 804:13, 805:4, 805:10, 824:18, 824:19 bullets [6] - 709:17, 709:18, 709:20, 765:18, 776:2, 780:17 bumper [4] - 695:18, 771:15, 772:6, 824:23 bunch [3] - 646:8, 707:16, 826:1 burden [9] - 741:25, 742:5, 753:2, 757:15, 782:18, 805:18, 818:18, 818:20, 818:24 bureau [1] - 630:6 Bureau [1] - 646:11 bury [1] - 788:13 business [1] - 828:12 butt [1] - 830:7 button [1] - 670:12 buy [1] - 768:10 buzz [1] - 779:12 BY [10] - 627:12, 637:21, 639:19, 650:3, 679:2, 682:5, 682:23, 685:14, 690:7, 712:6	665:14 calculation [7] - 662:2, 662:4, 662:5, 662:7, 706:5, 707:3, 753:8 calculations [4] - 660:25, 707:6, 707:7, 816:13 calculator [2] - 661:2, 661:24 calculus [1] - 722:24 callous [12] - 609:23, 614:11, 618:4, 618:16, 725:25, 726:12, 754:19, 755:6, 760:17, 784:11, 784:13, 822:1 cam [1] - 826:25 camera [1] - 826:25 candid [1] - 829:17 candidly [1] - 811:15 candor [3] - 727:23, 728:15, 831:4 cannot [12] - 613:1, 619:7, 640:15, 658:9, 671:4, 697:24, 757:19, 757:23, 765:6, 778:3, 827:12, 834:21 Canyon [1] - 607:19 capacity [3] - 607:4, 607:9, 748:3 Capitol [1] - 796:19 car [40] - 625:19, 655:25, 658:22, 666:12, 668:12, 669:1, 669:3, 669:14, 671:6, 671:7, 671:9, 695:22, 696:3, 697:16, 699:17, 703:18, 704:20, 705:12, 705:13, 708:19, 711:8, 711:10, 722:8, 765:22, 767:20, 773:14, 775:22, 776:1, 780:21, 818:4, 826:5, 826:6, 826:10, 826:12, 826:15, 826:19, 826:22, 826:24, 827:3 cardinal [1] - 780:5 care [11] - 652:13, 660:11, 661:22, 674:6, 705:19, 705:23, 733:3,	734:16, 760:5, 784:7, 820:15 career [4] - 627:18, 627:22, 782:17 careful [1] - 749:20 carefully [2] - 741:17, 745:3 carried [2] - 690:20, 691:21 Carroll [28] - 607:21, 613:18, 616:22, 619:1, 626:24, 715:25, 719:3, 720:2, 721:1, 723:11, 727:12, 727:22, 728:8, 729:3, 729:9, 729:25, 730:5, 731:10, 732:24, 735:1, 736:3, 738:8, 738:14, 739:4, 792:8, 795:16, 802:22, 819:13 CARROLL [34] - 609:8, 609:11, 613:10, 613:12, 613:17, 616:23, 619:21, 715:20, 719:4, 720:3, 721:4, 721:9, 723:12, 724:14, 724:17, 724:22, 725:16, 726:17, 726:23, 727:23, 729:4, 729:10, 729:12, 730:6, 730:12, 730:15, 731:11, 732:10, 732:25, 735:2, 736:1, 736:5, 738:15, 830:9 Carroll3 [1] - 608:3 carry [1] - 816:2 cars [2] - 655:12, 655:14 case [200] - 609:20, 609:21, 609:24, 610:8, 610:16, 611:2, 611:6, 611:24, 612:6, 612:10, 612:17, 612:22, 613:14, 614:4, 614:19, 616:11, 617:17, 620:15, 623:12, 623:16, 633:7, 633:8, 635:8, 635:15, 639:23, 640:8, 641:8, 644:14, 644:18,	653:7, 653:9, 653:13, 653:20, 654:5, 661:6, 662:6, 662:25, 663:14, 680:12, 682:17, 683:18, 683:20, 683:21, 685:23, 686:3, 687:22, 688:10, 691:17, 695:2, 695:4, 695:11, 696:7, 697:2, 701:1, 702:10, 702:20, 702:25, 703:4, 703:12, 706:14, 712:16, 713:2, 714:10, 714:13, 714:14, 715:6, 717:3, 720:16, 721:15, 722:2, 722:3, 724:5, 724:12, 725:2, 725:6, 725:10, 725:19, 726:10, 727:5, 727:8, 727:15, 728:19, 730:17, 730:19, 736:6, 736:17, 737:7, 737:23, 739:15, 740:1, 740:8, 740:13, 740:19, 741:5, 741:11, 741:18, 741:21, 743:6, 743:13, 743:15, 744:4, 744:14, 744:23, 745:6, 745:9, 746:15, 747:3, 747:7, 748:2, 748:13, 749:6, 749:19, 751:12, 752:17, 752:21, 753:21, 756:12, 756:22, 757:1, 757:3, 757:10, 758:11, 758:17, 758:18, 759:2, 759:3, 759:4, 762:8, 762:12, 762:13, 764:8, 765:19, 766:25, 768:22, 770:4, 770:11, 770:13, 772:14, 775:8, 782:14, 782:22, 786:15, 786:23, 787:19, 789:2, 789:14, 789:17, 789:18, 790:14, 790:17, 790:21, 790:22, 790:24, 791:13,	791:24, 794:8, 794:9, 794:20, 796:24, 797:5, 797:8, 797:15, 797:17, 797:23, 798:8, 798:14, 800:21, 802:3, 802:5, 803:1, 803:18, 804:15, 805:19, 806:2, 806:8, 807:16, 807:25, 808:22, 808:25, 809:9, 809:10, 809:11, 813:19, 815:5, 819:21, 820:9, 820:17, 820:20, 821:11, 822:5, 823:4, 823:9, 823:25, 825:2, 828:17, 832:8, 833:7 cases [33] - 618:5, 632:2, 632:3, 632:5, 632:11, 632:12, 632:19, 632:23, 632:24, 632:25, 633:6, 633:9, 640:19, 676:4, 677:4, 685:1, 685:18, 685:19, 685:21, 685:24, 686:9, 686:22, 687:3, 687:9, 687:13, 691:3, 725:11, 738:8, 781:17, 825:19 casing [2] - 691:12, 691:17 casings [8] - 689:8, 689:9, 689:17, 689:19, 690:9, 690:25, 691:2, 691:7 cast [1] - 791:10 catch [4] - 672:19, 680:8, 714:25, 720:5 catching [1] - 770:4 categories [2] - 726:8, 760:2 caught [6] - 781:13, 781:22, 781:24, 787:3, 787:12 caused [11] - 673:7, 699:20, 748:16, 749:11, 752:2, 752:8, 756:16, 764:6, 768:19, 807:18, 807:19 causing [2] - 764:4, 765:2 caution [1] - 761:18
C				
C1 [4] - 766:15, 776:10, 776:17, 777:11 cadets [3] - 629:16, 629:17, 793:7 calculated [1] -				

<p>Celebrezze [1] - 645:25</p> <p>celestial [1] - 661:25</p> <p>cell [1] - 829:8</p> <p>centers [1] - 738:10</p> <p>certain [8] - 676:5, 677:5, 691:2, 743:9, 757:25, 794:23, 811:12</p> <p>certainly [17] - 614:2, 614:6, 614:13, 615:18, 615:23, 616:3, 616:15, 617:16, 622:25, 623:11, 656:2, 713:17, 721:14, 723:13, 724:11, 726:11, 834:25</p> <p>certainty [5] - 679:12, 713:13, 805:3, 805:17, 808:10</p> <p>certification [3] - 630:1, 634:24, 665:1</p> <p>certifications [2] - 633:15, 633:17</p> <p>certified [1] - 816:23</p> <p>certify [2] - 836:5, 836:9</p> <p>certifying [1] - 634:3</p> <p>chain [1] - 743:8</p> <p>chair [1] - 740:4</p> <p>chance [5] - 684:5, 684:11, 685:25, 715:19, 731:24</p> <p>change [3] - 758:21, 794:1, 816:15</p> <p>changed [4] - 644:14, 659:24, 675:18, 679:18</p> <p>changes [2] - 644:13, 691:25</p> <p>changing [1] - 691:8</p> <p>character [1] - 754:21</p> <p>characterization [2] - 622:13, 732:1</p> <p>charge [36] - 620:6, 620:12, 629:2, 649:15, 681:1, 681:6, 681:7, 681:14, 715:2, 715:18, 715:19, 715:24, 716:11, 716:12, 718:3, 718:10, 718:22, 722:13, 729:3, 729:4, 729:7, 729:10, 729:14, 729:17, 729:19, 740:11, 741:1, 741:19, 795:9,</p>	<p>829:20, 830:12, 830:15, 830:21, 830:23, 830:25, 831:3</p> <p>charges [1] - 719:12</p> <p>chart [4] - 660:23, 660:25, 661:25</p> <p>chase [2] - 621:20, 722:8</p> <p>chat [1] - 835:6</p> <p>cheek [4] - 773:15, 775:20, 776:18</p> <p>chief [11] - 613:14, 617:17, 631:3, 631:4, 638:10, 638:24, 639:1, 657:14, 713:7, 766:13, 800:22</p> <p>Chiefs [1] - 676:22</p> <p>chiefs [1] - 633:25</p> <p>child [5] - 771:5, 786:9, 786:18, 788:11, 788:12</p> <p>childhoods [1] - 786:1</p> <p>children [3] - 630:13, 658:1, 785:10</p> <p>children's [1] - 785:20</p> <p>China [1] - 667:5</p> <p>choice [1] - 793:14</p> <p>choose [2] - 632:18, 632:23</p> <p>chopped [1] - 815:3</p> <p>Christy [6] - 719:21, 719:25, 748:3, 785:4, 785:9, 819:10</p> <p>CHRISTY [1] - 607:4</p> <p>Circuit [3] - 725:2, 725:11, 728:19</p> <p>circumstance [1] - 814:18</p> <p>circumstances [23] - 610:14, 619:10, 707:21, 720:23, 722:9, 722:16, 722:24, 723:4, 723:22, 724:8, 743:8, 746:11, 748:21, 749:15, 749:18, 749:21, 750:8, 750:20, 751:20, 779:6, 779:9, 779:11, 812:4</p> <p>circumstantial [3] - 743:7, 743:10, 743:13</p> <p>citation [1] - 612:17</p> <p>cite [1] - 635:10</p> <p>cited [5] - 616:7, 616:10, 644:24, 678:12, 678:14</p>	<p>citizen [1] - 764:5</p> <p>citizen's [1] - 764:1</p> <p>citizens [2] - 650:24, 763:22</p> <p>city [3] - 630:8, 630:13, 630:14</p> <p>CIVIL [1] - 607:4</p> <p>civil [12] - 632:3, 632:5, 632:11, 632:12, 632:13, 632:19, 728:14, 740:10, 741:21, 741:25, 754:17, 833:17</p> <p>civilian [3] - 622:1, 622:3, 648:13</p> <p>civilians [2] - 648:12, 670:14</p> <p>claim [54] - 609:13, 610:7, 611:14, 611:18, 611:25, 612:2, 612:7, 613:4, 613:5, 613:6, 613:8, 613:22, 614:15, 615:22, 616:17, 617:8, 617:12, 617:15, 617:23, 618:8, 618:11, 618:13, 618:21, 618:22, 618:25, 619:2, 619:3, 619:17, 700:2, 717:25, 718:4, 718:13, 719:18, 727:2, 728:1, 728:23, 742:3, 742:6, 749:4, 750:4, 751:4, 751:9, 752:6, 752:19, 754:16, 757:20, 779:10, 780:11, 790:14, 805:14, 807:6, 820:20, 821:21</p> <p>claimed [2] - 757:17, 797:6</p> <p>claiming [1] - 699:24</p> <p>claims [18] - 609:15, 612:22, 613:3, 613:5, 613:9, 614:21, 616:19, 616:20, 616:24, 698:16, 700:4, 700:5, 710:16, 718:16, 742:1, 748:13, 749:6, 753:15</p> <p>clarification [3] - 623:10, 625:18, 625:24</p> <p>clarified [1] - 791:11</p>	<p>clarify [1] - 679:3</p> <p>Clark [2] - 629:4, 629:5</p> <p>CLARKSBURG [1] - 607:2</p> <p>Clarksburg [2] - 607:13, 771:24</p> <p>class [2] - 664:25, 665:17</p> <p>classes [9] - 628:10, 628:16, 628:21, 629:19, 630:1, 630:19, 645:9, 646:12</p> <p>classify [1] - 769:3</p> <p>clear [14] - 612:6, 637:22, 638:10, 694:22, 698:9, 699:25, 723:25, 727:9, 727:16, 732:15, 751:17, 774:4, 774:5, 778:8</p> <p>clearly [7] - 738:9, 777:21, 778:4, 794:1, 807:17, 815:22</p> <p>CLERK [8] - 834:1, 834:5, 834:7, 834:9, 834:11, 834:13, 834:15, 834:17</p> <p>clerk [1] - 650:11</p> <p>Clerk [10] - 627:4, 778:14, 791:12, 828:23, 829:5, 831:22, 833:8, 833:13, 833:24, 834:20</p> <p>Cleveland [1] - 647:13</p> <p>click [1] - 649:10</p> <p>client [4] - 790:12, 791:10, 819:22, 821:16</p> <p>clients [1] - 743:21</p> <p>climb [1] - 708:11</p> <p>climbed [2] - 708:7, 708:8</p> <p>clock [1] - 712:23</p> <p>clones [1] - 645:23</p> <p>close [9] - 613:13, 618:7, 633:22, 636:16, 641:15, 645:24, 686:25, 824:11, 824:13</p> <p>closed [1] - 657:22</p> <p>closely [1] - 781:8</p> <p>CLOSING [1] - 608:7</p> <p>closing [20] - 733:16, 735:13, 735:15, 739:25, 743:15, 761:25, 762:2,</p>	<p>762:4, 762:15, 788:2, 789:19, 791:3, 800:1, 802:10, 819:8, 820:21, 821:2, 822:24, 823:5, 824:22</p> <p>closings [3] - 735:11, 735:12, 762:20</p> <p>clothing [1] - 676:24</p> <p>clubs [2] - 646:11, 646:12</p> <p>clutch [3] - 765:8, 804:1, 804:4</p> <p>co [2] - 615:5, 802:21</p> <p>co-counsel [2] - 615:5, 802:21</p> <p>coast [2] - 631:11</p> <p>Code [3] - 612:4, 612:24, 718:17</p> <p>codes [3] - 651:8, 651:10, 651:16</p> <p>coefficient [1] - 666:12</p> <p>coffin [1] - 670:24</p> <p>cognitive [1] - 641:13</p> <p>coincide [1] - 747:25</p> <p>cold [5] - 687:14, 688:6, 688:7, 688:10, 825:6</p> <p>college [2] - 627:17, 646:12</p> <p>colleges [1] - 630:16</p> <p>collude [2] - 799:19, 808:14</p> <p>colluded [3] - 799:12, 799:16, 799:25</p> <p>colluding [1] - 800:3</p> <p>collusion [1] - 800:2</p> <p>Colonel [1] - 631:6</p> <p>color [12] - 620:8, 651:8, 651:10, 651:16, 716:16, 717:5, 740:23, 748:6, 748:11, 748:24, 748:25, 813:4</p> <p>Columbus [5] - 647:12, 682:24, 684:1, 684:3, 712:20</p> <p>combative [2] - 629:12, 636:9</p> <p>comfort [3] - 626:11, 754:2, 789:10</p> <p>comfortable [1] - 627:8</p> <p>coming [22] - 624:16, 641:19, 670:10, 672:17, 677:11, 696:11, 698:10,</p>
--	--	--	---	--

<p>698:13, 709:24, 710:18, 710:19, 736:25, 765:16, 765:21, 772:7, 794:5, 795:13, 809:20, 809:24, 810:8, 810:15, 818:6 comma [1] - 722:13 command [1] - 638:17 commander [3] - 628:25, 801:24, 801:25 commands [8] - 651:13, 710:21, 710:22, 710:23, 784:3, 814:8, 814:12, 814:17 commenced [1] - 609:1 commend [1] - 768:11 comment [5] - 774:25, 791:2, 805:1, 805:2, 819:7 comments [2] - 681:6, 685:11 commercial [1] - 667:4 Commission [2] - 628:4, 644:20 commission [2] - 628:6, 630:3 commissioned [2] - 630:2, 630:21 commitment [2] - 630:23, 631:4 committed [1] - 755:16 committing [2] - 721:21, 721:22 common [8] - 728:12, 744:22, 747:6, 766:1, 770:21, 771:20, 772:12 commonwealth [1] - 728:20 communicate [1] - 761:14 communication [1] - 684:8 community [8] - 647:15, 648:7, 648:8, 648:10, 648:14, 649:14, 741:22, 782:17 companionship [1] - 754:1 company [2] - 769:1, 769:7 comparative [3] - 720:12, 720:15,</p>	<p>723:1 compelled [1] - 791:2 compensate [5] - 752:15, 752:22, 755:14, 755:25, 782:18 compensated [4] - 639:24, 640:1, 685:5, 686:16 compensatory [10] - 724:25, 725:12, 732:8, 752:13, 753:9, 753:10, 754:6, 754:13, 754:24, 756:17 complete [5] - 707:9, 761:8, 819:5, 819:21, 823:11 completed [4] - 643:3, 759:22, 760:22, 761:22 completely [8] - 688:18, 699:8, 768:19, 774:14, 807:22, 815:7, 825:19 completing [1] - 761:10 compliance [1] - 675:20 complicated [1] - 728:24 complied [5] - 659:12, 673:15, 674:25, 712:17, 817:17 comply [5] - 623:25, 673:8, 814:11, 814:13, 836:9 complying [2] - 621:12, 784:3 component [1] - 624:4 components [2] - 609:12, 818:15 computations [2] - 661:3, 791:23 computer [4] - 607:25, 646:4, 646:5, 661:2 computer-aided [1] - 607:25 conceal [2] - 756:15, 784:22 concede [2] - 616:14, 810:6 conceded [5] - 794:1, 794:9, 800:13, 806:4, 810:10 concedes [2] - 799:4, 800:11 concern [4] - 719:15, 720:7, 733:23,</p>	<p>740:24 concerned [4] - 677:20, 700:2, 758:8, 767:10 concerning [2] - 746:2, 747:13 concerns [5] - 715:11, 716:2, 723:1, 728:15, 732:23 conclude [2] - 737:18, 835:2 concluded [2] - 626:21, 835:25 conclusion [3] - 609:5, 674:24, 744:21 concourse [1] - 712:23 condition [1] - 742:14 conduct [27] - 609:22, 610:12, 611:22, 612:1, 612:8, 612:11, 619:6, 624:1, 629:19, 722:15, 751:19, 752:16, 754:18, 754:22, 755:2, 755:6, 755:9, 756:8, 756:12, 756:13, 757:3, 760:17, 784:11, 814:22, 818:7, 822:1, 822:10 conducted [1] - 746:2 conductive [1] - 629:12 conference [5] - 681:14, 715:18, 715:24, 829:6, 836:10 conferences [1] - 820:14 confident [1] - 652:17 confines [1] - 796:23 confirm [1] - 833:15 confirmed [2] - 768:16, 768:17 confirming [1] - 713:10 conflict [4] - 810:1, 810:3, 810:18, 811:2 confronted [1] - 817:16 confronting [4] - 669:2, 670:21, 671:5, 750:8 confuse [1] - 823:6 confusing [1] - 731:15 confusion [1] - 726:15 Congress [2] - 609:16, 609:18</p>	<p>connect [1] - 767:5 connection [2] - 746:9, 762:12 connor [1] - 702:22 Connor [8] - 644:18, 645:16, 658:10, 667:14, 667:16, 672:22, 673:17, 675:7 conscientious [3] - 718:13, 753:2, 755:17 consciously [1] - 753:5 consciousness [1] - 664:18 consequences [2] - 741:20, 831:5 consider [27] - 614:6, 638:3, 687:17, 698:17, 698:18, 722:15, 724:4, 730:20, 731:8, 734:4, 740:15, 741:18, 744:14, 745:3, 745:5, 745:16, 746:11, 746:22, 751:19, 752:13, 753:19, 756:5, 756:10, 756:21, 756:22, 821:9, 825:21 consideration [8] - 623:12, 625:18, 718:18, 734:12, 744:15, 758:18, 760:3, 820:19 considerations [1] - 746:25 considered [7] - 645:3, 721:23, 728:16, 734:8, 757:25, 758:11, 784:23 considering [3] - 730:10, 751:6, 829:21 consistency [2] - 719:19, 720:5 consistent [9] - 611:2, 640:13, 679:21, 719:19, 737:16, 743:2, 798:16, 800:5 consists [1] - 744:4 console [2] - 803:6, 804:6 conspiracy [1] - 800:1 constantly [1] - 766:23 constitute [1] - 743:18</p>	<p>constituted [1] - 719:12 Constitution [13] - 614:10, 720:16, 748:7, 763:17, 763:20, 776:3, 778:2, 779:20, 780:6, 782:24, 784:6, 788:22, 825:10 constitutional [14] - 614:12, 725:13, 740:22, 748:17, 749:2, 749:5, 749:11, 750:10, 764:1, 770:19, 774:20, 777:23, 779:1, 784:16 consult [1] - 758:14 consulting [1] - 631:14 contact [1] - 684:6 contacted [2] - 631:21, 645:24 contacting [1] - 808:3 contacts [1] - 644:19 contained [2] - 780:6, 783:1 context [7] - 616:24, 637:7, 645:5, 693:9, 728:1, 736:11, 795:10 continue [19] - 642:7, 647:2, 662:19, 663:17, 667:8, 686:20, 692:17, 714:10, 714:12, 762:8, 762:11, 773:12, 789:13, 789:15, 814:11, 829:25, 830:4 continued [2] - 647:1, 806:13 continues [5] - 624:24, 625:1, 710:22, 710:23, 814:15 continuum [6] - 649:19, 650:5, 650:13, 651:7, 652:21, 653:8 contradict [3] - 801:16, 802:8, 807:8 contradicted [1] - 745:9 contradictory [3] - 689:11, 745:23, 747:9 contrary [8] - 667:11, 671:15, 674:21,</p>
--	--	--	--	--

<p>702:8, 702:14, 703:6, 807:22, 829:13</p> <p>contravene [1] - 736:8</p> <p>control [10] - 629:6, 629:11, 633:22, 635:12, 648:16, 652:17, 729:22, 738:18, 748:1, 770:2</p> <p>convened [1] - 715:18</p> <p>convenience [1] - 759:10</p> <p>conversation [5] - 618:1, 640:18, 709:2, 728:24, 831:22</p> <p>convey [2] - 792:17, 795:11</p> <p>conviction [1] - 758:22</p> <p>convince [1] - 775:25</p> <p>convinced [3] - 726:10, 737:25, 758:21</p> <p>convincing [3] - 727:9, 727:17, 732:16</p> <p>cop [2] - 655:14, 670:11</p> <p>copies [4] - 676:13, 715:3, 735:3, 735:8</p> <p>cops [5] - 646:8, 646:19, 646:21, 825:12</p> <p>copy [13] - 681:1, 681:2, 715:3, 716:12, 729:17, 739:6, 740:3, 740:7, 740:16, 759:8, 759:10, 830:23, 831:16</p> <p>cord [5] - 731:25, 766:15, 766:17, 776:19, 777:2</p> <p>Corey [32] - 642:24, 693:7, 693:11, 693:14, 708:24, 709:3, 709:10, 709:12, 764:20, 768:21, 768:22, 769:4, 775:18, 781:6, 781:11, 791:16, 791:17, 808:1, 808:2, 808:4, 808:20, 808:22, 809:2, 811:13, 812:8, 826:2, 826:3, 826:8, 826:11, 826:15, 827:21, 827:24</p>	<p>Corp [3] - 631:7, 631:9, 631:13</p> <p>Corporal [1] - 629:3</p> <p>correct [47] - 619:1, 638:4, 638:5, 638:7, 638:9, 638:18, 644:24, 649:5, 652:5, 667:14, 672:7, 685:22, 689:1, 689:6, 690:14, 691:20, 693:2, 693:5, 694:18, 694:24, 698:12, 701:1, 701:7, 702:3, 702:7, 702:12, 703:3, 703:10, 703:15, 703:22, 704:9, 704:21, 705:3, 706:6, 707:19, 708:16, 709:17, 709:20, 710:1, 711:5, 712:9, 720:1, 726:6, 728:6, 736:3, 828:23, 836:6</p> <p>corrected [1] - 683:11</p> <p>corrections [1] - 628:11</p> <p>correctly [12] - 618:2, 629:14, 634:8, 644:24, 652:21, 672:22, 678:12, 678:13, 691:11, 692:9, 709:8, 821:3</p> <p>counsel [37] - 613:19, 613:22, 614:16, 615:5, 617:14, 618:2, 623:15, 624:9, 680:19, 714:5, 729:14, 731:15, 733:6, 735:13, 740:1, 743:15, 743:18, 747:24, 761:25, 763:13, 785:23, 790:7, 797:8, 797:24, 798:3, 799:14, 802:4, 802:11, 802:21, 804:20, 812:22, 819:8, 822:23, 828:9, 828:22, 828:24, 829:2</p> <p>counsel's [3] - 766:22, 772:18, 791:3</p> <p>counselor [1] - 632:21</p> <p>Counselor [1] - 632:22</p> <p>count [2] - 631:10, 662:1</p>	<p>countermeasures [1] - 633:23</p> <p>countless [1] - 781:17</p> <p>country [8] - 637:1, 646:23, 649:6, 680:21, 763:22, 771:23, 771:25, 779:24</p> <p>County [9] - 621:15, 630:2, 702:6, 702:11, 778:7, 778:8, 813:2, 813:14, 822:9</p> <p>couple [8] - 674:13, 675:11, 691:16, 738:19, 791:25, 792:1, 793:13, 818:15</p> <p>courage [1] - 827:10</p> <p>course [19] - 617:18, 624:25, 634:13, 634:16, 658:15, 679:15, 679:16, 691:1, 715:7, 720:9, 722:6, 729:16, 744:9, 747:18, 758:20, 781:21, 791:9, 815:5, 830:24</p> <p>courses [1] - 633:23</p> <p>COURT [163] - 607:1, 609:2, 609:10, 613:7, 613:11, 613:16, 613:18, 616:9, 616:21, 617:14, 619:22, 620:3, 620:10, 620:12, 621:19, 622:5, 622:20, 622:24, 623:3, 623:13, 623:17, 623:20, 624:6, 624:20, 625:6, 625:9, 625:16, 625:25, 626:5, 626:8, 626:10, 626:14, 626:18, 627:3, 627:7, 637:15, 637:19, 638:22, 639:1, 639:4, 639:6, 639:9, 649:25, 679:1, 680:2, 680:6, 680:17, 681:1, 681:11, 681:18, 681:21, 681:25, 685:12, 689:23, 690:2, 690:4, 711:25, 712:2, 712:4, 713:17, 713:20, 713:23,</p>	<p>713:25, 714:2, 714:19, 714:22, 714:24, 715:17, 715:23, 719:3, 719:7, 719:14, 719:23, 720:2, 720:4, 720:25, 721:6, 721:25, 722:4, 722:11, 723:10, 723:17, 724:16, 724:21, 725:8, 726:5, 726:21, 727:11, 727:21, 728:5, 728:8, 729:6, 729:9, 729:11, 729:13, 730:4, 730:11, 730:14, 730:21, 731:9, 731:20, 732:19, 733:1, 733:11, 733:18, 733:22, 734:6, 734:11, 734:15, 734:19, 734:22, 735:1, 735:3, 735:16, 735:22, 736:3, 737:21, 738:16, 738:18, 739:1, 739:4, 739:7, 739:12, 759:22, 762:19, 762:22, 762:24, 763:4, 763:8, 763:11, 786:6, 786:23, 787:1, 787:21, 788:1, 789:8, 789:23, 790:3, 796:23, 798:13, 810:24, 822:18, 822:21, 827:19, 828:9, 828:22, 829:5, 829:12, 830:6, 830:11, 830:22, 831:13, 831:15, 831:19, 831:21, 832:2, 832:14, 832:18, 832:25, 834:19, 835:12, 835:21, 835:23</p> <p>Court [69] - 609:19, 612:23, 614:3, 614:5, 616:8, 617:15, 617:19, 618:11, 618:21, 618:24, 619:11, 619:16, 621:12, 639:13, 644:13, 659:13, 673:8, 673:16, 674:25, 675:21, 679:21,</p>	<p>712:17, 713:14, 714:6, 716:14, 717:4, 717:15, 717:21, 717:24, 718:4, 718:15, 718:25, 723:15, 723:25, 724:7, 725:7, 725:23, 725:24, 726:1, 727:24, 729:18, 732:20, 735:20, 737:6, 737:21, 737:24, 740:25, 747:24, 757:5, 761:14, 763:13, 779:21, 780:13, 782:25, 784:21, 790:7, 790:24, 817:17, 822:11, 822:23, 831:8, 834:20, 835:13, 835:16, 836:4, 836:10, 836:15</p> <p>court [41] - 609:1, 612:5, 612:15, 624:14, 626:17, 634:5, 635:5, 641:24, 643:9, 644:22, 659:1, 677:4, 680:16, 681:24, 714:18, 728:14, 728:17, 729:15, 737:14, 739:11, 741:24, 759:8, 760:22, 761:16, 762:18, 763:10, 770:1, 772:21, 777:4, 789:22, 790:2, 792:6, 792:9, 793:19, 793:23, 824:14, 828:21, 832:17, 833:1, 835:11</p> <p>Court's [26] - 618:10, 618:20, 619:5, 619:18, 619:25, 620:25, 621:8, 625:4, 681:7, 715:2, 715:19, 716:11, 718:3, 718:9, 718:21, 719:11, 720:24, 722:13, 724:20, 725:17, 725:21, 727:1, 729:7, 734:23, 735:3, 743:24</p> <p>courthouse [1] - 774:19</p> <p>Courtney [4] - 612:5, 612:6, 616:11</p>
--	--	---	--	--

<p>courtroom [22] - 626:16, 642:23, 658:14, 673:5, 680:15, 681:23, 714:7, 739:10, 739:19, 744:12, 761:13, 762:25, 763:9, 764:16, 789:21, 790:1, 791:1, 794:11, 803:9, 829:9, 832:16, 835:3</p> <p>Courts [1] - 635:3</p> <p>courts [2] - 636:3, 723:22</p> <p>cover [16] - 615:9, 615:10, 624:23, 680:19, 753:11, 756:15, 776:16, 776:23, 776:24, 777:6, 784:22, 785:2, 802:20, 814:14, 825:25, 827:13</p> <p>covered [3] - 664:24, 717:4, 720:23</p> <p>covering [1] - 769:24</p> <p>covers [1] - 718:23</p> <p>coverup [7] - 615:7, 617:3, 617:8, 769:25, 770:2, 784:25, 785:1</p> <p>covering [1] - 776:16</p> <p>Cranberry [1] - 607:23</p> <p>crap [1] - 794:19</p> <p>crazy [2] - 735:23, 819:18</p> <p>create [6] - 609:17, 609:18, 617:11, 757:12, 763:24, 788:6</p> <p>created [3] - 609:16, 727:5, 737:13</p> <p>creating [1] - 723:1</p> <p>credence [1] - 746:13</p> <p>credibility [6] - 744:24, 745:24, 746:7, 747:17, 781:23, 782:4</p> <p>crime [11] - 638:6, 692:22, 704:15, 717:18, 721:20, 721:21, 721:22, 751:16, 771:22, 779:8, 779:14</p> <p>criminal [2] - 632:24, 632:25</p> <p>critical [6] - 631:24, 636:21, 644:11, 647:11, 675:5,</p>	<p>700:25</p> <p>criticism [2] - 672:8, 672:9</p> <p>CROSS [2] - 637:20, 682:4</p> <p>cross [5] - 625:25, 626:3, 680:4, 713:12, 812:13</p> <p>Cross [1] - 608:6</p> <p>CROSS-EXAMINATION [2] - 637:20, 682:4</p> <p>Cross-examination [1] - 608:6</p> <p>cross-examination [2] - 626:3, 713:12</p> <p>cross-examining [1] - 812:13</p> <p>cruiser [52] - 624:23, 625:1, 657:4, 657:17, 657:21, 660:9, 661:8, 661:20, 661:22, 663:3, 663:7, 664:17, 665:8, 665:10, 667:25, 668:9, 668:16, 668:20, 669:10, 669:11, 669:17, 669:22, 670:18, 670:19, 671:12, 671:18, 671:20, 671:23, 671:24, 672:2, 674:4, 678:23, 704:7, 705:7, 707:1, 710:20, 792:23, 795:2, 803:15, 806:9, 806:11, 806:12, 806:14, 806:17, 806:18, 809:17, 810:13, 814:6, 814:8, 814:15, 815:24</p> <p>cruisers [4] - 657:14, 663:4, 670:21, 674:13</p> <p>culmination [2] - 644:9, 649:18</p> <p>curious [1] - 623:4</p> <p>current [2] - 684:10, 716:12</p> <p>curve [1] - 654:21</p> <p>cut [5] - 655:17, 667:2, 679:7, 715:10, 793:18</p> <p>Cut [1] - 795:5</p> <p>cuts [1] - 665:24</p> <p>Cutter [2] - 836:3, 836:14</p>	<p>CV [3] - 683:3, 684:25, 781:17</p> <p>cycles [1] - 678:13</p> <p style="text-align: center;">D</p> <p>D.C [1] - 796:19</p> <p>dad [8] - 769:2, 769:4, 786:20, 787:2, 787:9, 820:22, 827:23</p> <p>dad's [1] - 787:5</p> <p>Daddy [1] - 787:10</p> <p>daddy [3] - 787:10, 787:13, 788:8</p> <p>damage [3] - 658:4, 724:25, 758:9</p> <p>damages [131] - 609:13, 609:16, 609:19, 609:21, 610:7, 613:22, 614:3, 614:7, 614:14, 615:6, 615:11, 616:24, 617:8, 617:12, 617:24, 618:8, 618:12, 716:19, 716:21, 716:23, 718:7, 718:8, 718:15, 718:17, 724:19, 725:1, 725:4, 725:12, 725:14, 725:19, 725:23, 726:9, 726:24, 727:3, 727:5, 727:6, 727:8, 727:15, 728:1, 728:16, 730:13, 731:14, 732:7, 732:8, 732:12, 732:16, 733:5, 733:10, 748:5, 752:4, 752:11, 752:13, 752:20, 752:25, 753:6, 753:7, 753:9, 753:10, 753:16, 754:7, 754:10, 754:13, 754:14, 754:16, 754:17, 754:21, 754:25, 755:1, 755:3, 755:9, 755:12, 755:13, 755:19, 755:23, 755:24, 755:25, 756:2, 756:4, 756:6, 756:10, 756:18, 756:23, 756:24, 756:25, 757:4, 757:6, 757:8,</p>	<p>757:11, 757:16, 757:18, 757:20, 757:21, 757:22, 757:24, 758:1, 758:4, 758:7, 758:8, 759:25, 760:1, 760:2, 760:8, 760:10, 760:11, 760:12, 760:13, 760:24, 761:2, 761:3, 783:21, 784:10, 784:19, 785:8, 785:9, 785:13, 819:20, 820:8, 821:17, 821:19, 822:6</p> <p>danger [1] - 616:5</p> <p>dangerous [8] - 620:19, 620:20, 621:3, 621:7, 623:24, 655:10, 655:18, 825:16</p> <p>darkest [1] - 782:1</p> <p>darkness [2] - 827:21, 828:7</p> <p>dash [1] - 826:25</p> <p>date [6] - 759:21, 760:21, 761:4, 761:12, 819:5, 833:22</p> <p>Dave [5] - 811:22, 826:17, 826:18, 826:23</p> <p>DAVID [1] - 607:9</p> <p>David [36] - 722:18, 723:5, 740:21, 748:5, 748:10, 748:15, 748:16, 748:24, 749:1, 749:5, 749:8, 749:10, 750:23, 750:25, 751:11, 751:21, 752:9, 752:12, 752:16, 755:4, 755:5, 757:13, 757:15, 758:1, 759:16, 760:15, 760:17, 783:13, 790:20, 791:14, 792:13, 797:15, 797:18, 818:13, 823:10</p> <p>Dawson [3] - 829:15, 832:22, 833:23</p> <p>days [9] - 691:17, 738:2, 774:6, 774:9, 774:10, 774:15, 782:1, 793:13, 818:22</p> <p>dead [8] - 652:2,</p>	<p>731:18, 765:7, 766:9, 770:19, 772:10, 780:2, 827:2</p> <p>deadline [1] - 835:18</p> <p>deadlocked [3] - 829:23, 831:6, 831:11</p> <p>deadly [21] - 653:3, 692:21, 699:24, 709:25, 722:6, 722:9, 722:17, 723:5, 749:8, 750:14, 750:15, 750:20, 751:1, 751:21, 765:2, 778:23, 778:24, 796:10, 796:15, 796:16, 796:17</p> <p>Deaf [1] - 646:13</p> <p>deal [1] - 833:6</p> <p>dealing [4] - 716:21, 736:12, 796:9, 797:19</p> <p>dealings [1] - 821:24</p> <p>deals [1] - 718:6</p> <p>dealt [1] - 741:23</p> <p>dear [1] - 824:9</p> <p>death [52] - 609:14, 611:23, 612:7, 612:9, 612:12, 612:13, 612:21, 612:23, 612:25, 613:4, 613:8, 616:17, 618:22, 619:2, 619:10, 621:10, 621:14, 622:14, 636:22, 647:12, 659:11, 730:17, 730:24, 731:1, 731:16, 731:17, 750:17, 751:25, 752:1, 752:2, 752:3, 752:5, 752:7, 752:9, 752:17, 752:20, 752:24, 753:3, 753:14, 753:18, 753:21, 753:25, 756:1, 764:5, 778:12, 778:13, 782:18, 820:6, 820:23</p> <p>debate [1] - 660:5</p> <p>decedent [7] - 612:19, 612:23, 722:15, 730:19, 740:22, 751:13, 751:19</p> <p>deceit [1] - 746:4</p> <p>decide [24] - 656:21, 668:3, 668:6,</p>
---	--	---	--	---

<p>672:24, 676:6, 676:8, 676:9, 702:15, 717:24, 741:21, 749:16, 756:4, 757:7, 758:17, 781:2, 783:23, 785:6, 790:12, 813:15, 813:19, 814:20, 817:10, 819:17, 823:8</p> <p>decided [2] - 723:25, 790:25</p> <p>decides [1] - 711:1</p> <p>deciding [1] - 746:25</p> <p>decision [18] - 611:11, 612:6, 612:15, 612:19, 635:11, 644:12, 651:9, 651:15, 651:16, 651:17, 702:16, 733:2, 746:21, 783:20, 791:15, 795:25, 796:5, 814:22</p> <p>decisions [1] - 741:12</p> <p>declaration [1] - 829:23</p> <p>declare [1] - 619:11</p> <p>deduction [1] - 744:21</p> <p>deemed [1] - 639:10</p> <p>deer [8] - 665:23, 824:4, 824:5, 824:6, 824:11, 824:13, 824:15, 824:18</p> <p>default [2] - 752:3, 752:8</p> <p>defend [3] - 684:10, 684:19, 713:3</p> <p>defendant [123] - 610:3, 613:7, 614:8, 614:17, 615:8, 615:20, 616:7, 621:5, 622:9, 626:23, 627:1, 632:8, 682:10, 684:19, 686:6, 687:23, 688:16, 688:25, 692:20, 696:9, 696:15, 696:25, 697:9, 697:17, 697:21, 698:15, 698:24, 699:23, 700:8, 700:13, 700:15, 700:20, 700:22, 702:5, 702:10, 702:18, 703:1, 703:17, 704:20, 704:23, 706:9,</p>	<p>708:11, 708:24, 709:3, 709:17, 709:23, 710:16, 710:20, 710:21, 710:22, 710:23, 711:3, 711:19, 711:20, 711:21, 715:21, 717:1, 717:11, 718:18, 719:5, 720:13, 722:8, 722:18, 735:6, 736:1, 736:5, 736:20, 739:14, 740:21, 742:6, 742:10, 742:21, 748:10, 748:16, 749:1, 752:11, 754:16, 755:15, 755:20, 755:21, 756:12, 756:13, 756:15, 762:2, 763:18, 764:19, 765:10, 766:11, 767:2, 768:14, 769:11, 769:14, 769:15, 769:18, 770:6, 770:18, 770:23, 771:2, 771:7, 772:3, 773:9, 774:19, 775:12, 775:25, 776:11, 777:22, 778:5, 780:2, 780:9, 782:8, 782:12, 782:16, 782:21, 783:9, 784:3, 784:20, 785:4, 785:13, 788:16, 788:21, 825:18, 826:24, 827:24</p> <p>Defendant [41] - 607:10, 607:21, 611:8, 612:1, 617:1, 710:24, 719:22, 748:5, 748:14, 748:15, 748:24, 749:5, 749:7, 749:8, 749:10, 750:8, 750:9, 750:23, 750:25, 751:10, 751:21, 751:24, 752:9, 752:12, 752:16, 755:4, 755:5, 757:13, 757:15, 758:1, 759:16, 760:15, 760:17, 783:13, 790:20, 810:3, 818:13, 819:9, 821:19, 822:1, 833:19</p>	<p>defendant's [48] - 609:22, 610:22, 611:2, 614:20, 698:5, 702:3, 716:25, 717:7, 717:16, 717:17, 718:2, 718:6, 718:10, 718:12, 718:14, 721:2, 721:7, 723:19, 730:8, 732:20, 737:12, 737:13, 737:14, 742:13, 742:18, 754:18, 754:22, 756:8, 756:11, 757:3, 764:23, 765:12, 766:18, 766:21, 767:3, 767:14, 769:5, 772:12, 772:18, 776:20, 777:6, 780:17, 781:12, 785:3, 785:22, 789:19, 797:13, 823:24</p> <p>Defendant's [3] - 717:22, 718:3, 778:14</p> <p>defendants [1] - 782:7</p> <p>defended [1] - 687:10</p> <p>defending [1] - 686:14</p> <p>defense [2] - 714:21, 733:6</p> <p>DEFENSE [2] - 608:4, 627:6</p> <p>defense's [1] - 831:7</p> <p>defensive [1] - 629:6</p> <p>defined [3] - 621:17, 778:15, 815:22</p> <p>definition [1] - 711:15</p> <p>definitive [4] - 678:18, 678:19, 701:25, 706:4</p> <p>defy [1] - 625:5</p> <p>degrade [1] - 785:16</p> <p>degree [4] - 633:19, 679:12, 713:13, 749:17</p> <p>degrees [3] - 654:20, 691:8, 691:10</p> <p>deliberate [4] - 615:6, 758:15, 830:5, 830:10</p> <p>deliberating [1] - 829:22</p> <p>deliberation [2] - 758:20, 830:20</p> <p>deliberations [13] - 740:2, 743:20, 744:11, 748:1,</p>	<p>759:7, 759:23, 760:23, 761:21, 762:6, 828:11, 828:17, 828:20, 829:25</p> <p>demeanor [1] - 745:4</p> <p>demonstrated [1] - 615:7</p> <p>demonstrations [1] - 648:5</p> <p>demonstrative [3] - 773:4, 774:4, 786:25</p> <p>denial [1] - 724:1</p> <p>denied [2] - 725:24, 738:12</p> <p>denies [3] - 827:15</p> <p>Dennis [6] - 634:5, 746:15, 774:6, 775:14, 791:18, 794:11</p> <p>deny [5] - 617:15, 618:11, 618:22, 737:21, 771:1</p> <p>depart [1] - 835:3</p> <p>department [7] - 615:10, 647:21, 649:14, 704:14, 769:4, 809:5, 827:23</p> <p>Department [6] - 621:15, 630:9, 647:20, 813:3, 813:14, 822:9</p> <p>department's [1] - 764:3</p> <p>Department's [2] - 702:6, 702:11</p> <p>Departments [1] - 778:9</p> <p>departments [3] - 649:4, 649:6, 691:5</p> <p>deploy [2] - 722:6, 722:9</p> <p>deposed [1] - 802:3</p> <p>deposition [21] - 642:22, 675:2, 675:6, 682:7, 682:20, 685:7, 691:20, 693:12, 707:7, 713:1, 768:22, 781:11, 791:18, 796:7, 798:10, 798:16, 808:5, 809:3, 809:14, 812:11, 816:10</p> <p>depositions [1] - 653:15</p> <p>depravation [2] - 720:16, 754:11</p> <p>depressed [1] - 804:4</p>	<p>deprived [4] - 740:21, 748:6, 749:1, 749:5</p> <p>depriving [1] - 774:19</p> <p>deputies [3] - 656:25, 778:8, 778:10</p> <p>deputy [14] - 621:12, 622:21, 622:23, 623:4, 659:12, 697:11, 697:13, 697:25, 736:21, 766:13, 779:5, 801:21, 802:21, 813:9</p> <p>Deputy [188] - 610:24, 620:17, 621:9, 621:22, 621:25, 622:2, 623:6, 623:8, 624:1, 624:9, 624:10, 624:11, 624:13, 624:15, 624:16, 624:17, 624:24, 625:1, 625:3, 625:12, 631:17, 641:4, 641:6, 641:25, 642:2, 642:19, 642:24, 654:3, 654:8, 654:9, 655:4, 655:22, 656:5, 657:3, 657:4, 657:7, 657:11, 657:24, 658:1, 658:11, 658:18, 659:10, 661:11, 662:13, 664:9, 664:11, 664:12, 665:8, 666:19, 667:1, 667:9, 668:1, 668:8, 668:18, 668:20, 669:1, 669:9, 671:7, 671:11, 671:18, 672:5, 672:9, 672:17, 672:18, 673:7, 673:15, 674:24, 675:17, 675:23, 676:13, 676:17, 677:25, 678:6, 679:4, 679:20, 698:9, 699:13, 704:18, 704:23, 712:16, 721:11, 721:20, 736:24, 737:15, 737:19, 791:16, 792:3, 792:13, 792:18, 792:23, 793:1, 793:5, 793:17, 793:25, 794:3, 794:6, 794:14, 794:16,</p>
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<p>794:24, 795:12, 795:24, 796:3, 797:12, 797:15, 797:21, 797:25, 798:18, 798:24, 799:1, 799:12, 800:3, 800:8, 801:2, 801:16, 801:19, 802:8, 803:2, 803:22, 804:4, 804:9, 804:12, 806:2, 806:3, 806:8, 806:14, 806:19, 806:23, 806:24, 807:1, 807:4, 807:8, 807:9, 808:25, 809:15, 809:17, 809:19, 810:1, 810:3, 810:4, 810:6, 810:11, 810:13, 811:15, 811:17, 811:22, 811:25, 812:1, 812:2, 812:5, 812:10, 812:19, 812:21, 812:24, 813:5, 813:8, 813:9, 813:11, 813:20, 813:23, 814:21, 815:7, 817:15, 817:17, 817:24, 818:7, 818:25, 819:13, 822:5, 822:7, 822:15 deputy's [1] - 736:7 derivative [4] - 613:4, 613:9, 616:19, 618:23 describe [4] - 650:5, 650:6, 684:2, 816:11 described [18] - 634:20, 663:20, 667:22, 700:10, 794:2, 795:8, 802:18, 804:4, 804:10, 809:16, 809:19, 810:4, 810:6, 810:12, 810:19, 811:21, 811:22, 814:3 describes [3] - 810:18, 811:3, 811:4 description [4] - 801:17, 802:9, 807:9, 813:7 deserve [1] - 788:15 deserves [4] - 744:25, 746:8, 747:3, 747:17 designed [4] - 754:10, 754:25, 755:1, 770:12</p>	<p>desire [3] - 757:2, 761:14, 835:16 desperate [1] - 785:17 despite [4] - 731:25, 799:8, 810:11, 821:21 detail [9] - 628:22, 628:23, 631:24, 633:17, 664:24, 708:21, 745:17, 785:17 detailed [3] - 629:17, 629:18, 647:14 details [1] - 827:16 detective [1] - 630:6 deter [1] - 755:13 determination [3] - 610:11, 721:19, 747:7 determinations [1] - 724:9 determine [10] - 619:5, 740:18, 740:21, 746:12, 748:16, 748:18, 749:10, 749:12, 753:9, 756:3 determined [3] - 713:14, 724:4, 746:10 determining [8] - 722:17, 723:4, 742:22, 751:20, 752:20, 752:25, 756:5, 758:7 deterrence [1] - 754:23 deterrent [1] - 754:25 devalue [1] - 785:19 developed [1] - 675:9 deviation [1] - 650:21 devices [1] - 629:12 devil [1] - 827:16 diagrams [1] - 666:25 die [4] - 658:6, 788:15, 811:23, 826:18 died [1] - 826:18 dies [3] - 786:12, 827:20, 828:7 difference [2] - 660:7, 796:11 differences [1] - 810:16 different [16] - 630:16, 634:18, 636:13, 654:16, 655:16, 674:17, 677:3, 692:15, 726:7, 726:12, 745:11, 806:5, 806:15,</p>	<p>806:16, 811:9 differently [1] - 745:14 differing [1] - 728:21 difficulty [1] - 643:13 dilate [1] - 636:16 dime [1] - 765:22 dinner [2] - 787:12, 787:13 dire [1] - 637:15 Direct [1] - 608:5 direct [8] - 695:3, 712:13, 713:9, 725:21, 743:6, 743:10, 743:13, 808:15 DIRECT [1] - 627:11 directed [1] - 797:25 directing [1] - 751:18 direction [13] - 661:16, 691:2, 691:24, 697:6, 698:14, 699:8, 699:19, 708:20, 768:20, 776:5, 811:25, 813:12 directly [4] - 624:1, 641:6, 666:23, 697:10 director [2] - 647:20, 648:5 Director [1] - 647:23 dirt [2] - 770:20, 827:2 disability [1] - 753:18 disagree [11] - 654:12, 654:14, 656:10, 656:12, 675:24, 676:1, 676:2, 688:18, 689:13, 692:18, 695:2 disagreed [1] - 688:20 disagreement [4] - 658:25, 660:24, 661:4, 678:11 disappear [4] - 705:6, 705:8, 705:9, 705:10 disappeared [2] - 705:11, 826:21 disappearing [1] - 705:14 discern [1] - 707:17 discharge [1] - 779:6 discharged [4] - 801:19, 803:5, 808:22, 809:1 disclosed [1] - 749:19 discomfort [1] - 753:18 discount [3] - 690:16, 777:21, 800:19 discounted [1] -</p>	<p>706:17 discourage [1] - 755:10 discovery [1] - 798:14 discredit [1] - 745:12 discredited [2] - 745:21, 747:9 discrepancies [1] - 745:10 discrepancy [3] - 699:25, 745:16, 745:18 discretion [1] - 725:5 discuss [7] - 625:9, 674:22, 714:6, 715:7, 762:20, 828:17, 832:10 discussed [4] - 634:19, 636:7, 707:6, 714:14 discussing [4] - 714:10, 737:7, 762:8, 789:13 discussion [4] - 667:14, 673:12, 678:15, 737:22 discussions [1] - 829:25 disfigurement [1] - 753:18 disk [1] - 646:5 dismiss [2] - 609:12, 681:12 dismissed [6] - 610:7, 613:5, 717:22, 718:1, 718:5, 727:2 dispatch [2] - 657:7, 661:15 disposal [1] - 738:20 disprove [1] - 690:10 disproves [1] - 702:2 disproving [1] - 689:17 dispute [6] - 619:14, 620:7, 736:19, 738:10, 808:21, 808:25 disputes [4] - 724:5, 737:23, 738:4, 768:1 disregard [2] - 624:3, 743:19 disregarded [3] - 701:2, 744:11, 744:13 disrupt [1] - 709:18 disservice [1] - 819:21 DIST [1] - 612:17 distance [14] - 657:5, 660:11, 660:19, 660:25, 661:1,</p>	<p>661:23, 662:2, 662:6, 705:19, 707:3, 707:7, 767:1, 791:23, 816:13 distinction [2] - 728:13, 743:10 distinctly [2] - 694:23, 695:12 distortions [3] - 636:15, 636:17, 636:25 distract [1] - 770:12 distress [16] - 609:14, 611:17, 611:19, 611:21, 611:24, 612:1, 612:7, 612:22, 613:3, 616:2, 616:16, 619:17, 708:22, 717:25, 727:2, 753:22 DISTRICT [2] - 607:1, 607:2 district [2] - 801:24, 801:25 District [10] - 607:13, 612:14, 612:18, 616:10, 635:9, 683:20, 836:4, 836:5, 836:15, 836:16 distrust [2] - 746:5, 747:14 disturbance [15] - 615:21, 673:23, 674:19, 695:8, 695:10, 699:2, 699:3, 699:20, 700:11, 701:20, 767:24, 781:5, 807:13, 807:17, 807:22 disturbed [2] - 674:2, 696:16 ditch [6] - 701:9, 772:4, 772:5, 773:21, 794:12, 818:1 dive [1] - 739:17 diving [1] - 617:25 division [1] - 629:3 divisions [1] - 646:24 divorced [1] - 787:5 dock [1] - 787:8 docket [2] - 612:16, 717:1 doctor's [1] - 731:16 doctors [2] - 733:25, 734:3 document [1] - 716:5</p>
---	--	--	---	--

<p>documents [6] - 639:22, 640:20, 642:11, 642:13, 770:3</p> <p>dollar [2] - 725:5, 743:17</p> <p>dollars [2] - 686:13, 686:17</p> <p>domestic [1] - 668:12</p> <p>done [29] - 637:4, 644:7, 645:6, 647:24, 649:18, 653:13, 671:15, 676:21, 678:18, 691:5, 720:14, 724:1, 727:17, 766:17, 766:18, 774:11, 774:12, 774:15, 774:17, 795:15, 797:7, 799:4, 816:24, 817:12, 817:13, 819:3, 819:6, 828:4</p> <p>door [6] - 657:22, 670:6, 670:14, 677:12, 677:17, 777:8</p> <p>doors [2] - 670:11, 670:12</p> <p>doubt [3] - 764:14, 797:3, 826:16</p> <p>down [87] - 622:7, 627:19, 629:18, 644:12, 647:22, 651:11, 653:2, 657:2, 657:3, 657:4, 657:6, 657:10, 657:15, 660:2, 660:9, 660:10, 661:10, 661:13, 661:14, 661:21, 662:12, 662:13, 662:19, 663:6, 663:9, 663:16, 663:17, 664:4, 664:15, 664:17, 665:5, 667:2, 667:3, 669:8, 669:9, 674:9, 675:13, 679:5, 682:7, 682:19, 696:10, 700:5, 703:19, 704:2, 710:17, 713:25, 732:14, 761:15, 765:16, 766:16, 767:13, 776:10, 776:22, 776:23, 777:4, 778:20, 787:5, 787:6, 791:5, 792:25, 793:8,</p>	<p>793:18, 794:13, 796:4, 797:12, 797:13, 797:16, 797:22, 803:5, 803:6, 805:11, 805:13, 809:6, 813:25, 814:2, 816:3, 816:5, 818:1, 821:22, 824:13, 824:18, 835:18</p> <p>downloadable [1] - 649:15</p> <p>downward [3] - 776:7, 776:10, 777:5</p> <p>Dr [7] - 634:15, 731:22, 802:20, 804:23, 805:5, 805:9, 805:16</p> <p>drafting [1] - 728:13</p> <p>draw [5] - 667:10, 677:1, 727:16, 744:18, 744:22</p> <p>drawer [1] - 828:6</p> <p>drawing [5] - 641:22, 666:25, 774:11, 774:12, 774:16</p> <p>drawn [1] - 721:15</p> <p>drew [1] - 774:7</p> <p>drive [2] - 663:6, 803:23</p> <p>driven [4] - 695:23, 721:12, 797:1, 816:5</p> <p>driver [10] - 655:20, 656:2, 665:18, 666:1, 700:5, 737:2, 765:7, 765:23, 766:2, 766:3</p> <p>driver's [3] - 624:23, 677:12, 806:9</p> <p>driving [13] - 610:18, 665:8, 665:18, 675:3, 695:22, 703:10, 709:19, 711:13, 767:15, 767:19, 804:12, 813:15, 822:15</p> <p>drop [1] - 831:1</p> <p>drove [6] - 640:22, 771:10, 797:13, 797:16, 797:22, 821:22</p> <p>drug [1] - 630:5</p> <p>ducking [6] - 776:16, 776:19, 776:23, 776:24, 784:4, 802:19</p> <p>due [4] - 690:19, 691:21, 693:22, 757:7</p> <p>Dukes [2] - 771:22,</p>	<p>779:15</p> <p>duplicating [1] - 731:14</p> <p>during [23] - 617:16, 673:5, 675:3, 675:16, 679:17, 682:17, 682:20, 685:7, 694:8, 700:21, 706:18, 707:7, 736:19, 743:15, 744:9, 747:18, 748:1, 753:16, 768:17, 772:22, 791:9, 810:23, 834:22</p> <p>Durst [17] - 607:21, 626:24, 627:9, 639:11, 639:17, 680:2, 681:18, 712:2, 714:20, 735:1, 735:17, 739:4, 762:22, 790:5, 796:24, 822:18, 835:21</p> <p>DURST [53] - 620:11, 621:21, 623:18, 623:21, 624:7, 624:22, 625:11, 626:6, 627:1, 627:10, 627:12, 637:12, 639:18, 639:19, 649:23, 650:3, 678:24, 679:2, 679:25, 681:19, 685:10, 689:21, 689:24, 712:3, 712:6, 713:16, 713:18, 713:24, 714:21, 728:7, 733:13, 733:21, 734:21, 735:18, 739:5, 739:8, 762:23, 763:7, 786:5, 786:21, 787:17, 790:6, 792:7, 796:25, 798:11, 798:15, 811:2, 829:4, 830:17, 831:7, 832:1, 832:13, 835:22</p> <p>Durst.....</p> <p>.....184 [1] - 608:9</p> <p>Durst.....21 [1] - 608:5</p> <p>duty [17] - 619:5, 620:18, 630:4, 654:3, 655:4, 655:23, 656:3, 658:12, 658:19,</p>	<p>740:9, 740:10, 740:25, 741:3, 741:14, 758:14, 778:6, 813:18</p> <p>dynamic [1] - 658:10</p> <p style="text-align: center;">E</p> <p>ear [1] - 681:12</p> <p>early [1] - 829:23</p> <p>earn [1] - 686:20</p> <p>earned [1] - 686:17</p> <p>ease [2] - 659:6, 738:22</p> <p>easier [2] - 656:14, 669:8</p> <p>east [1] - 631:11</p> <p>easy [2] - 795:6, 819:23</p> <p>eat [1] - 715:1</p> <p>edition [2] - 665:16, 719:9</p> <p>education [1] - 644:5</p> <p>Edwards [1] - 725:3</p> <p>effect [6] - 634:17, 745:16, 749:13, 758:23, 785:11, 785:12</p> <p>effecting [2] - 748:20, 749:14</p> <p>effects [1] - 798:20</p> <p>effort [1] - 784:22</p> <p>efforts [4] - 714:13, 724:8, 789:16, 789:17</p> <p>egregious [2] - 633:1, 755:2</p> <p>eight [8] - 630:14, 660:6, 717:20, 719:20, 724:23, 726:25, 733:20, 834:17</p> <p>either [13] - 613:25, 637:6, 642:18, 642:24, 663:7, 687:10, 741:15, 745:6, 745:8, 768:3, 776:24, 784:2, 835:7</p> <p>ejected [1] - 691:25</p> <p>ejection [1] - 691:13</p> <p>elapsed [1] - 795:5</p> <p>elective [1] - 612:17</p> <p>element [7] - 620:8, 742:1, 742:3, 746:4, 749:2, 749:4, 757:18</p> <p>elements [3] - 611:6, 716:9, 748:23</p> <p>eluded [1] - 816:19</p> <p>email [1] - 649:10</p> <p>embankment [4] -</p>	<p>794:13, 815:10, 815:13, 818:2</p> <p>emotional [18] - 609:14, 611:17, 611:19, 611:21, 611:24, 612:1, 612:7, 612:21, 613:2, 613:3, 616:2, 616:16, 618:25, 619:17, 708:22, 717:25, 727:2, 753:22</p> <p>emphasis [1] - 662:24</p> <p>emphasized [1] - 785:24</p> <p>employed [5] - 628:7, 748:20, 749:14, 751:3, 751:8</p> <p>employment [6] - 629:22, 629:23, 630:12, 631:25, 683:25, 685:2</p> <p>empty [4] - 629:11, 633:19, 635:12, 652:16</p> <p>empty-hand [1] - 652:16</p> <p>enables [1] - 724:1</p> <p>encounter [2] - 636:22, 652:19</p> <p>encountering [2] - 651:20, 652:5</p> <p>encourage [1] - 829:24</p> <p>end [12] - 658:4, 722:22, 722:23, 723:3, 727:7, 731:5, 764:21, 770:6, 770:19, 777:3, 796:11, 827:2</p> <p>ended [5] - 650:17, 803:20, 803:21, 804:7, 835:2</p> <p>energy [1] - 629:12</p> <p>Enforcement [7] - 673:9, 673:19, 675:1, 675:21, 679:22, 712:18, 817:18</p> <p>enforcement [40] - 627:23, 627:24, 628:1, 629:3, 629:23, 630:1, 630:20, 632:8, 632:12, 632:15, 632:20, 632:23, 633:1, 633:2, 636:6, 637:8, 637:14, 644:13, 644:15, 646:15, 648:11,</p>
---	--	--	---	--

<p>648:12, 655:11, 659:13, 670:1, 670:3, 670:15, 684:2, 687:4, 691:18, 713:3, 717:19, 722:21, 749:17, 751:14, 751:17, 771:19, 793:4, 796:12, 814:25</p> <p>enforcement's [1] - 619:13</p> <p>engaged [2] - 624:1, 756:13</p> <p>engine [7] - 615:23, 700:3, 710:23, 765:11, 765:13, 781:6, 804:10</p> <p>enjoy [1] - 684:12</p> <p>ensued [2] - 752:3, 752:10</p> <p>enter [3] - 664:18, 835:13, 835:16</p> <p>entered [4] - 626:16, 664:21, 681:23, 790:1</p> <p>entering [1] - 625:19</p> <p>entire [7] - 701:11, 715:5, 720:21, 722:14, 770:4, 772:19</p> <p>entirely [2] - 744:10, 744:13</p> <p>entitled [6] - 614:6, 614:14, 752:3, 752:10, 752:21, 754:8</p> <p>entity [1] - 634:4</p> <p>entrance [3] - 664:7, 667:20, 818:1</p> <p>entries [1] - 792:1</p> <p>entry [5] - 659:6, 776:9, 776:14, 792:12, 793:16</p> <p>equal [3] - 741:22, 741:23, 810:16</p> <p>equals [1] - 741:24</p> <p>equations [1] - 660:20</p> <p>equivalency [1] - 723:1</p> <p>erroneous [1] - 758:22</p> <p>error [2] - 730:10, 745:18</p> <p>errors [1] - 611:15</p> <p>escape [1] - 750:16</p> <p>escaping [1] - 750:15</p> <p>especially [7] - 620:21, 620:25, 621:8, 621:14, 736:11, 764:2,</p>	<p>771:11</p> <p>essential [3] - 742:1, 742:3, 757:18</p> <p>essentially [5] - 610:3, 610:21, 611:1, 611:23, 730:18</p> <p>establish [7] - 719:18, 742:2, 742:5, 745:25, 751:9, 757:17, 812:12</p> <p>established [12] - 613:1, 617:16, 633:3, 736:9, 736:12, 738:9, 741:11, 744:23, 751:4, 778:4, 821:21, 823:3</p> <p>estate [20] - 607:5, 612:20, 724:24, 748:4, 748:22, 749:4, 750:21, 751:5, 751:23, 752:6, 752:14, 752:18, 752:20, 752:22, 753:1, 753:15, 754:5</p> <p>estimates [1] - 647:4</p> <p>ethically [1] - 632:19</p> <p>evaluate [1] - 668:3</p> <p>evaluated [3] - 673:2, 673:3, 676:25</p> <p>evaluation [1] - 678:16</p> <p>evasive [1] - 671:4</p> <p>evening [3] - 829:12, 830:1, 834:23</p> <p>evenly [2] - 742:4, 742:19</p> <p>event [18] - 616:14, 660:13, 660:17, 666:6, 667:10, 678:1, 757:9, 793:13, 794:4, 798:19, 806:4, 807:9, 810:18, 810:19, 811:3, 811:4, 811:5, 811:11</p> <p>events [13] - 609:25, 614:20, 615:21, 615:24, 678:2, 753:17, 765:13, 766:20, 767:2, 767:3, 767:9, 767:14, 801:17</p> <p>evidence [235] - 610:1, 610:16, 610:22, 611:1, 614:19, 615:1, 615:2, 615:19, 615:24, 616:5, 616:15,</p>	<p>617:1, 617:20, 617:22, 618:17, 619:13, 621:19, 622:3, 626:23, 639:14, 667:22, 667:23, 676:23, 687:14, 687:15, 687:17, 687:22, 688:4, 688:5, 689:4, 689:13, 689:14, 690:11, 690:17, 692:7, 692:9, 692:18, 694:4, 694:20, 694:21, 694:24, 695:12, 696:7, 697:2, 698:25, 699:6, 699:12, 700:9, 700:14, 700:19, 700:22, 700:25, 701:5, 702:2, 704:13, 706:11, 706:15, 706:18, 706:20, 706:22, 708:2, 720:17, 721:10, 722:19, 725:6, 726:2, 726:7, 726:8, 726:11, 727:10, 731:7, 732:2, 732:14, 732:16, 733:15, 733:18, 733:19, 734:6, 734:7, 735:7, 737:11, 737:17, 738:4, 739:15, 739:20, 740:8, 740:13, 740:18, 741:4, 741:7, 741:11, 741:18, 742:2, 742:4, 742:7, 742:8, 742:10, 742:11, 742:12, 742:13, 742:17, 742:18, 742:19, 742:20, 742:24, 742:25, 743:1, 743:4, 743:6, 743:7, 743:11, 743:12, 743:14, 743:18, 743:21, 743:22, 743:23, 744:2, 744:4, 744:6, 744:8, 744:9, 744:13, 744:14, 744:15, 744:23, 745:9, 746:9, 746:12, 746:20, 747:3, 747:9, 747:10, 747:24, 748:23, 750:22, 751:6, 751:12, 753:4,</p>	<p>755:4, 755:15, 757:1, 757:10, 757:16, 757:19, 758:18, 758:23, 759:4, 759:15, 759:25, 760:15, 764:13, 764:15, 764:16, 764:18, 764:25, 767:4, 767:8, 767:24, 768:5, 768:9, 770:3, 772:14, 772:23, 773:2, 774:24, 774:25, 775:8, 775:9, 775:10, 777:15, 777:16, 777:17, 777:18, 777:20, 780:24, 780:25, 781:1, 781:2, 783:12, 786:23, 787:19, 788:1, 790:25, 797:14, 797:17, 797:22, 798:14, 799:14, 800:8, 800:10, 801:16, 801:18, 802:8, 803:1, 807:8, 807:21, 815:21, 817:2, 817:3, 817:4, 817:5, 817:7, 818:13, 818:21, 818:23, 818:25, 819:15, 820:17, 821:9, 821:11, 821:13, 821:23, 822:14, 822:25, 823:1, 823:6, 823:17, 823:18, 823:21, 824:21, 825:1, 825:4, 827:1, 827:17, 833:19</p> <p>evidentiary [5] - 617:18, 618:14, 623:15, 691:18, 728:21</p> <p>evil [15] - 609:22, 614:2, 618:2, 618:13, 725:21, 726:2, 726:3, 726:18, 732:17, 750:10, 754:18, 755:5, 760:16, 784:11, 821:20</p> <p>evolving [4] - 645:1, 672:23, 736:18, 794:3</p> <p>exact [5] - 645:1, 662:16, 700:10, 758:7, 766:25</p>	<p>exactitude [1] - 758:5</p> <p>exactly [15] - 667:19, 669:22, 671:14, 676:21, 690:12, 733:15, 764:11, 783:8, 792:18, 793:2, 793:11, 794:11, 795:3, 804:7, 815:3</p> <p>EXAMINATION [4] - 627:11, 637:20, 682:4, 712:5</p> <p>examination [6] - 608:5, 608:6, 626:3, 713:10, 713:12, 798:12</p> <p>examine [1] - 758:21</p> <p>examiner [6] - 730:17, 730:23, 766:13, 775:19, 802:21, 804:21</p> <p>examiner's [1] - 731:21</p> <p>examining [1] - 812:13</p> <p>example [6] - 651:12, 670:5, 720:11, 742:9, 755:21, 787:25</p> <p>exception [2] - 616:14, 800:12</p> <p>exceptions [1] - 763:18</p> <p>excerpt [1] - 796:7</p> <p>excessive [33] - 609:13, 609:17, 610:8, 611:3, 611:5, 611:6, 611:14, 612:11, 614:15, 614:17, 615:12, 617:11, 617:15, 617:23, 618:8, 618:11, 618:21, 635:18, 635:24, 646:20, 726:9, 748:9, 748:12, 748:14, 749:7, 749:16, 750:4, 753:24, 759:17, 783:15, 818:14, 822:5, 833:20</p> <p>exchanging [3] - 676:13, 676:18, 678:6</p> <p>excited [5] - 641:20, 780:19, 787:8, 787:12, 787:13</p> <p>exclude [2] - 635:6, 725:22</p> <p>exclusion [1] - 723:13</p>
---	--	---	--	--

<p>excuse [11] - 647:12, 659:13, 679:16, 736:22, 761:24, 762:5, 801:21, 809:15, 823:23, 828:18, 830:1</p> <p>excused [5] - 713:23, 714:17, 762:17, 828:20, 835:10</p> <p>executioner [1] - 771:3</p> <p>Exhibit [1] - 778:14</p> <p>exhibit [1] - 774:4</p> <p>exhibits [6] - 716:13, 735:3, 744:6, 828:15, 828:25, 829:2</p> <p>exigencies [1] - 610:14</p> <p>exigent [2] - 779:9, 779:11</p> <p>exist [1] - 723:24</p> <p>existence [2] - 743:8, 743:9</p> <p>exit [5] - 710:20, 776:25, 777:5, 784:2, 815:15</p> <p>exited [3] - 624:22, 809:17, 810:13</p> <p>exiting [5] - 669:11, 671:12, 671:25, 806:9, 806:14</p> <p>exits [2] - 624:24, 672:2</p> <p>expect [4] - 652:7, 665:20, 669:4, 741:17</p> <p>expected [2] - 665:17, 665:19</p> <p>experience [7] - 644:6, 713:2, 744:20, 745:15, 815:1, 817:12, 826:7</p> <p>experienced [3] - 746:19, 784:2, 805:15</p> <p>expert [43] - 610:21, 611:7, 623:15, 631:14, 631:15, 631:16, 631:20, 631:25, 632:7, 635:2, 635:18, 636:2, 637:13, 637:23, 637:25, 638:3, 638:23, 639:2, 639:11, 639:13, 639:15, 640:19, 684:10, 684:20, 687:1, 702:17, 702:20,</p>	<p>737:9, 737:10, 737:12, 737:15, 746:14, 746:16, 746:18, 747:2, 769:20, 772:12, 777:21, 782:11, 799:3, 802:25, 825:6</p> <p>expert's [2] - 746:22, 746:23</p> <p>expertise [3] - 640:12, 679:13, 713:13</p> <p>experts [7] - 635:14, 635:19, 738:2, 747:5, 770:16, 774:13</p> <p>experts' [1] - 738:2</p> <p>expired [1] - 619:3</p> <p>explain [5] - 650:12, 664:22, 673:11, 673:13, 690:23</p> <p>explained [6] - 687:5, 694:12, 701:21, 702:13, 730:24, 816:24</p> <p>explanation [8] - 688:12, 688:24, 691:24, 692:4, 710:5, 710:11, 722:22, 776:25</p> <p>Explorer [1] - 828:3</p> <p>exposed [1] - 814:16</p> <p>express [1] - 746:16</p> <p>expressly [5] - 725:10, 733:6, 776:2, 779:19, 780:9</p> <p>extensive [3] - 720:15, 723:20, 727:18</p> <p>extensively [1] - 727:25</p> <p>extent [13] - 611:9, 611:22, 613:5, 617:3, 617:7, 725:16, 726:1, 727:4, 728:11, 745:7, 753:19, 791:7</p> <p>extra [1] - 714:4</p> <p>extracted [1] - 635:17</p> <p>extreme [4] - 611:21, 616:4, 619:6, 619:13</p> <p>eye [3] - 634:17, 677:13, 826:25</p> <p>eyes [2] - 664:12, 685:6</p> <p>eyewitness [1] - 743:7</p>	<p>769:21, 773:10, 773:17, 776:24, 777:3, 777:24, 781:16, 784:5, 815:11</p> <p>faced [11] - 699:7, 772:22, 776:15, 776:19, 776:20, 776:21, 777:7, 777:8, 781:13</p> <p>facing [4] - 711:7, 794:4, 795:13, 822:15</p> <p>fact [34] - 610:17, 614:17, 615:8, 615:9, 615:21, 616:11, 624:11, 635:21, 640:13, 654:8, 657:18, 660:8, 663:9, 676:18, 688:10, 706:19, 716:7, 721:19, 724:3, 757:4, 757:11, 757:24, 766:24, 777:22, 778:5, 794:20, 799:8, 804:17, 809:4, 813:22, 821:21, 821:23, 823:8, 830:19</p> <p>factor [4] - 636:8, 663:13, 673:20, 673:22</p> <p>factors [8] - 634:14, 644:23, 652:12, 672:21, 707:20, 728:21, 756:5, 756:21</p> <p>facts [35] - 613:20, 614:16, 619:9, 661:5, 662:6, 687:14, 688:6, 688:7, 706:21, 721:22, 736:17, 740:12, 740:19, 740:20, 741:10, 743:5, 743:9, 743:11, 744:7, 744:18, 744:22, 746:11, 746:21, 747:7, 747:21, 749:21, 750:8, 759:2, 777:20, 794:20, 797:2, 817:15, 820:25, 821:8, 825:7</p> <p>factual [4] - 724:5, 737:23, 738:4, 738:10</p>	<p>factually [1] - 658:14</p> <p>fail [1] - 742:2</p> <p>failed [6] - 623:25, 650:23, 724:25, 742:5, 751:9, 754:6</p> <p>failure [2] - 723:13, 745:14</p> <p>fair [1] - 658:24</p> <p>fairly [3] - 720:14, 736:9, 752:15</p> <p>Fairmont [1] - 771:24</p> <p>fairness [1] - 633:9</p> <p>fall [3] - 757:17, 773:13, 773:15</p> <p>falling [2] - 773:9, 773:10</p> <p>false [3] - 693:12, 781:9, 825:3</p> <p>falsehood [1] - 745:19</p> <p>falsely [2] - 746:2, 747:13</p> <p>familiar [2] - 737:6, 767:16</p> <p>family [7] - 614:24, 733:8, 754:3, 785:12, 785:16, 786:12</p> <p>fancy [1] - 830:13</p> <p>far [3] - 659:21, 764:9, 772:6</p> <p>Farrar [1] - 725:9</p> <p>fashion [1] - 766:1</p> <p>fast [6] - 664:17, 672:13, 793:10, 793:11, 815:23, 828:1</p> <p>fatal [6] - 670:6, 670:7, 670:8, 670:13, 670:16</p> <p>father [13] - 754:4, 771:3, 782:19, 785:11, 786:10, 786:18, 787:18, 788:5, 788:8, 820:6, 820:13, 821:5, 821:7</p> <p>father's [1] - 786:10</p> <p>fatherless [1] - 771:3</p> <p>fathers [1] - 763:22</p> <p>Faulkner [69] - 619:24, 620:15, 623:18, 623:22, 624:12, 627:2, 627:3, 627:7, 627:13, 627:15, 627:16, 637:13, 637:22, 639:9, 639:10, 639:12, 639:20, 649:21, 650:4, 654:1, 658:24, 664:14, 679:3, 679:10,</p>	<p>680:1, 680:18, 680:19, 681:9, 681:25, 682:6, 682:9, 682:16, 683:19, 684:23, 685:15, 690:1, 690:15, 698:21, 703:7, 712:7, 713:19, 713:21, 746:15, 765:18, 770:8, 774:5, 774:14, 775:13, 781:16, 792:17, 792:20, 793:2, 793:6, 794:2, 794:5, 794:22, 797:3, 802:15, 803:11, 803:19, 804:14, 807:17, 813:17, 815:17, 816:4, 816:18, 816:19, 817:8, 817:11</p> <p>FAULKNER [2] - 608:4, 627:6</p> <p>Faulkner's [3] - 635:22, 689:25, 766:21</p> <p>fault [2] - 720:12, 723:2</p> <p>favor [7] - 617:23, 738:5, 752:5, 757:9, 764:12, 777:22, 782:16</p> <p>favorable [6] - 613:21, 617:20, 618:17, 640:15, 794:18, 794:20</p> <p>favoring [1] - 742:20</p> <p>fear [5] - 736:25, 753:23, 765:2, 788:11</p> <p>feasible [1] - 750:20</p> <p>February [1] - 716:5</p> <p>fed [1] - 768:14</p> <p>federal [18] - 728:3, 728:10, 728:12, 728:14, 728:17, 728:18, 740:22, 748:2, 749:1, 749:5, 751:4, 751:9, 754:8, 754:11, 770:1, 772:22, 774:19, 775:7</p> <p>federally [6] - 618:4, 754:20, 755:7, 760:18, 784:12, 822:2</p> <p>feed [1] - 768:17</p> <p>fees [1] - 836:9</p> <p>feet [16] - 654:24,</p>
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F**F-a-u-l-k-n-e-r** [1] -

627:15

face [10] - 765:3,*Jill M. Cutter, RPR**500 W. Pike Street, Clarksburg, WV 26301 (304) 622-8513*

<p>660:5, 660:6, 660:12, 665:11, 665:12, 665:13, 665:14, 669:19, 691:4, 705:24, 767:22, 793:1, 810:7, 828:3 fell [1] - 802:12 fellow [5] - 714:11, 758:19, 758:24, 762:9, 762:10 felon [4] - 620:20, 620:21, 623:24 felonious [1] - 624:1 felons [2] - 629:25, 630:7 felony [2] - 620:23, 621:1 felt [3] - 642:13, 668:17, 801:9 few [13] - 633:11, 637:17, 681:13, 703:7, 714:5, 729:23, 730:6, 738:22, 739:16, 774:6, 787:14, 789:23 field [5] - 637:13, 679:12, 713:13, 731:4, 746:19 fields [1] - 639:11 fighter [2] - 668:5 figure [6] - 707:17, 795:11, 795:17, 795:18, 815:1, 815:3 figured [1] - 795:20 figures [1] - 743:17 figuring [2] - 643:13, 643:14 file [4] - 790:12, 831:22, 834:20, 835:16 filed [5] - 716:5, 717:1, 770:5, 789:2, 823:25 fill [2] - 783:8, 783:10 filled [2] - 685:2, 781:17 filter [1] - 667:8 final [24] - 657:19, 657:20, 662:10, 664:7, 664:13, 667:24, 667:25, 674:3, 674:4, 678:22, 696:12, 696:17, 697:15, 698:11, 706:23, 707:1, 708:3, 710:13, 740:11, 741:1, 741:19, 803:14, 803:15</p>	<p>finalizing [1] - 620:6 finally [9] - 611:16, 664:6, 762:3, 762:5, 809:18, 810:5, 810:9, 810:10, 828:16 financial [2] - 782:18, 820:16 findings [1] - 706:1 fine [5] - 660:21, 680:5, 697:23, 697:24, 709:6 finish [1] - 787:25 finite [1] - 804:15 fire [7] - 658:1, 703:2, 704:14, 776:20, 784:4, 811:15, 811:18 firearm [4] - 641:22, 671:4, 691:15, 779:6 firearms [4] - 629:12, 636:9, 644:15, 676:23 fired [16] - 657:8, 657:24, 658:5, 696:21, 709:17, 711:2, 711:18, 711:20, 794:25, 795:1, 795:6, 800:8, 800:11, 809:10, 814:19, 824:25 fires [2] - 710:25, 780:4 firm [7] - 633:10, 686:6, 686:18, 686:20, 687:1, 766:22, 772:18 first [54] - 619:1, 620:6, 620:17, 621:12, 626:25, 628:20, 630:4, 631:22, 633:8, 633:12, 636:21, 640:2, 640:11, 645:8, 646:4, 646:19, 649:3, 657:2, 664:12, 667:1, 669:14, 682:9, 719:16, 719:17, 720:8, 731:11, 739:16, 740:18, 748:23, 749:2, 762:2, 766:19, 769:17, 772:25, 773:2, 773:6, 774:22, 774:23, 785:6, 787:3, 792:4, 805:23, 818:11, 818:23, 821:12,</p>	<p>823:23, 824:2, 825:5, 828:12, 829:13, 829:19, 829:21, 830:17, 832:20 firsthand [1] - 684:6 fish [3] - 787:3, 787:11, 787:15 fishing [1] - 787:8 fistfight [1] - 651:2 fit [2] - 767:8, 767:9 five [23] - 626:11, 631:4, 631:5, 660:5, 661:17, 680:10, 689:9, 716:19, 717:11, 717:15, 717:16, 761:24, 762:14, 762:16, 763:1, 787:10, 824:5, 824:12, 824:13, 824:20, 834:11, 835:5 five-minute [1] - 626:11 five-minutes [1] - 761:24 five-year [1] - 631:4 fixed [2] - 756:3, 756:19 Flanagan [1] - 607:22 flat [2] - 654:16, 782:3 fled [6] - 708:19, 720:18, 751:13, 776:2, 818:4, 824:17 flee [7] - 624:2, 720:19, 751:14, 751:16, 797:2 fleeing [12] - 620:19, 620:20, 623:24, 717:18, 720:7, 720:22, 721:1, 722:5, 722:21, 771:21, 780:22, 784:16 flip [2] - 764:12, 796:14 floor [1] - 777:9 floorboard [2] - 776:13, 803:7 floppy [1] - 646:5 Florida [6] - 627:19, 627:20, 654:15, 654:22, 682:7, 682:19 fluid [1] - 736:15 fly [1] - 630:6 focus [6] - 754:20, 797:6, 797:7, 798:4, 798:13, 799:23 focused [2] - 699:22,</p>	<p>701:22 focusing [3] - 664:17, 664:20, 809:1 folks [27] - 722:22, 729:20, 729:21, 767:1, 767:23, 770:21, 770:24, 771:7, 771:19, 772:4, 772:8, 772:19, 773:2, 773:24, 775:11, 779:2, 779:12, 780:11, 780:15, 780:23, 781:1, 785:25, 788:3, 823:3, 824:22, 825:4, 835:15 follow [6] - 740:4, 740:5, 740:11, 741:18, 744:3, 813:15 followed [3] - 655:24, 795:9, 801:10 following [25] - 623:6, 626:16, 655:15, 655:20, 657:3, 680:15, 681:23, 714:17, 722:14, 739:10, 748:23, 753:15, 756:5, 760:1, 762:17, 763:9, 774:9, 779:6, 789:21, 790:1, 811:10, 812:25, 828:20, 832:16, 835:10 follows [1] - 684:4 fool [1] - 775:6 foot [4] - 690:20, 691:21, 813:24, 814:21 Force [8] - 634:9, 634:12, 634:21, 634:24, 665:17, 678:12, 691:5, 817:13 force [98] - 609:13, 609:17, 610:8, 611:3, 611:5, 611:6, 611:14, 612:11, 614:9, 614:13, 614:15, 614:18, 615:12, 617:11, 617:13, 617:15, 617:23, 618:8, 618:11, 618:21, 621:16, 622:16, 625:22, 628:24, 629:2, 629:10, 629:13, 633:18,</p>	<p>635:18, 635:24, 636:3, 637:14, 643:21, 643:22, 645:2, 645:18, 646:15, 646:21, 649:5, 650:18, 651:22, 651:23, 653:3, 664:24, 675:23, 677:9, 679:13, 684:10, 684:20, 685:20, 692:19, 692:21, 698:6, 699:24, 702:6, 702:11, 709:25, 720:9, 722:6, 722:9, 722:17, 723:5, 726:9, 748:9, 748:12, 748:14, 748:18, 749:7, 749:9, 749:12, 749:15, 749:17, 750:1, 750:4, 750:11, 750:12, 750:14, 750:15, 750:20, 751:1, 751:2, 751:7, 751:21, 753:24, 759:15, 765:3, 778:7, 778:9, 778:23, 778:24, 779:19, 783:13, 812:18, 812:20, 818:13, 822:5, 833:19 force-related [1] - 628:24 foregoing [1] - 836:6 Forensic [1] - 665:16 FOREPERSON [1] - 832:24 foreperson [9] - 759:6, 759:7, 761:5, 761:8, 761:11, 828:13, 829:14, 832:4, 832:22 foresight [1] - 763:23 forever [2] - 678:3, 798:22 forget [3] - 780:8, 798:20, 798:22 forgive [1] - 783:4 forgiveness [1] - 783:3 forgotten [2] - 639:20, 644:4 form [43] - 642:18, 675:23, 716:12, 716:13, 720:13, 729:24, 729:25,</p>
---	--	---	--	---

<p>730:5, 732:9, 732:22, 732:23, 733:5, 733:12, 733:14, 733:20, 734:17, 734:20, 734:23, 734:24, 759:9, 759:11, 759:21, 760:21, 761:6, 761:8, 761:10, 761:12, 783:6, 783:8, 783:11, 818:11, 819:5, 819:16, 821:10, 821:18, 828:14, 832:6, 833:4, 833:5, 833:16, 833:22, 834:20</p> <p>format [1] - 836:9 formed [1] - 772:15 former [1] - 774:8 forms [1] - 739:6 formula [2] - 756:3, 756:19 formulate [6] - 644:2, 653:8, 653:17, 653:20, 659:16, 673:14 formulated [3] - 641:1, 655:7, 673:3 formulating [1] - 639:23 formulation [4] - 641:7, 643:19, 662:25, 673:4 FORSYTH [1] - 607:9 Forsyth [163] - 609:5, 611:8, 615:15, 615:17, 617:1, 620:18, 621:22, 621:25, 622:2, 624:2, 624:9, 624:10, 624:13, 624:15, 624:16, 624:20, 624:24, 625:1, 625:12, 631:17, 641:4, 641:6, 642:2, 642:19, 642:24, 654:3, 654:8, 655:4, 655:22, 656:5, 657:3, 657:7, 657:24, 658:11, 658:18, 661:11, 662:13, 664:9, 664:12, 665:8, 666:19, 667:1, 667:9, 668:1, 668:8, 669:1, 669:9, 671:7, 671:18, 672:5,</p>	<p>672:18, 675:17, 676:13, 676:17, 677:25, 678:6, 679:5, 698:9, 699:13, 710:25, 719:22, 721:11, 722:18, 723:5, 736:24, 737:15, 737:19, 740:21, 748:6, 748:10, 748:15, 748:24, 749:1, 749:5, 749:8, 750:8, 750:23, 750:25, 751:11, 751:21, 751:24, 752:9, 752:12, 755:4, 757:13, 757:15, 759:16, 760:16, 760:17, 783:14, 790:20, 791:14, 792:3, 792:13, 792:18, 792:23, 793:1, 793:5, 793:6, 793:17, 793:25, 794:3, 794:6, 794:14, 794:16, 794:24, 795:12, 795:24, 796:3, 797:12, 797:16, 797:18, 797:25, 798:18, 798:24, 799:1, 799:12, 800:3, 800:8, 801:2, 801:19, 803:2, 803:22, 804:4, 804:9, 804:12, 806:8, 806:19, 806:24, 807:1, 807:4, 808:25, 809:15, 809:17, 810:13, 811:15, 811:17, 811:22, 812:1, 812:2, 812:5, 812:10, 812:19, 812:21, 812:24, 813:5, 813:9, 813:11, 815:7, 817:16, 817:24, 818:13, 819:9, 819:13, 821:19, 822:5, 822:7, 822:15, 823:10, 833:17, 833:19 Forsyth's [38] - 610:24, 611:10, 612:1, 621:9, 623:7, 641:25, 659:10, 671:11, 672:9, 673:7, 673:15, 674:24, 675:23,</p>	<p>679:20, 712:16, 721:20, 748:16, 749:10, 750:9, 752:16, 755:6, 758:1, 769:2, 797:21, 801:16, 802:8, 806:2, 807:1, 807:8, 810:3, 811:25, 813:20, 813:23, 814:21, 817:17, 818:7, 818:25, 822:1 forth [6] - 615:24, 616:15, 705:18, 742:9, 742:11, 810:9 forthcoming [1] - 739:23 forward [14] - 624:16, 627:4, 666:13, 715:12, 771:11, 773:11, 774:2, 802:12, 802:13, 806:13, 811:20, 811:24, 826:10 foundation [1] - 690:2 founding [1] - 763:22 four [15] - 609:4, 609:11, 660:13, 660:17, 666:24, 667:10, 668:7, 716:17, 716:18, 717:9, 774:12, 789:2, 824:2, 824:12, 834:9 Fourth [4] - 725:2, 725:10, 728:18, 778:3 fourth [1] - 633:19 fourth-degree [1] - 633:19 Fowler [1] - 607:22 fractions [1] - 796:10 frame [1] - 677:17 framed [1] - 675:22 frames [1] - 735:23 frankly [2] - 616:13, 734:7 free [5] - 625:25, 748:8, 762:24, 835:7, 835:8 frequently [2] - 632:17, 797:1 Friday [3] - 607:12, 834:23, 835:15 front [22] - 615:16, 624:1, 624:21, 624:25, 640:14, 650:8, 658:4, 665:19, 665:24, 668:20, 697:16,</p>	<p>764:21, 776:7, 776:11, 777:1, 777:5, 780:4, 781:25, 789:3, 826:9, 826:10, 827:25 frying [1] - 787:15 fulfilled [1] - 658:19 full [1] - 692:4 fully [4] - 614:4, 623:19, 695:19, 752:22 fun [2] - 819:24, 821:12 function [3] - 721:17, 783:4, 783:5 functions [1] - 731:18 fund [1] - 646:2 funeral [1] - 796:12 funnel [3] - 670:6, 670:8, 670:16 funneling [1] - 670:13 funny [1] - 683:18 future [2] - 755:11, 755:22 fuzzy [2] - 831:2, 831:9</p>	<p>804:1, 804:3, 804:6, 804:7, 804:8, 805:21, 805:22, 805:23, 806:12, 823:9 gears [2] - 804:9, 804:12 general [26] - 621:10, 621:13, 622:14, 625:21, 650:22, 655:21, 659:11, 666:5, 681:5, 681:7, 684:12, 692:10, 707:22, 743:9, 745:23, 752:13, 753:7, 753:9, 754:7, 755:8, 759:24, 760:2, 760:8, 760:10 General [2] - 645:24, 646:11 General's [5] - 627:25, 628:5, 630:17, 631:23, 644:19 generally [3] - 650:14, 743:4, 794:24 genesis [1] - 727:15 gentleman [1] - 793:3 gentlemen [68] - 626:18, 626:20, 639:12, 646:14, 647:16, 680:6, 714:2, 739:12, 739:14, 740:9, 761:22, 763:14, 763:16, 769:25, 772:24, 773:10, 775:23, 777:14, 777:25, 781:10, 782:6, 782:15, 782:23, 783:3, 783:16, 784:23, 787:24, 788:17, 789:5, 789:9, 790:4, 790:8, 791:2, 791:8, 791:13, 791:22, 792:5, 793:21, 795:21, 796:2, 796:18, 798:7, 799:18, 804:18, 805:16, 806:2, 808:12, 809:2, 812:25, 813:24, 815:4, 816:9, 818:9, 818:21, 819:12, 820:4, 820:19, 821:1, 821:8, 822:4, 825:12, 827:20, 828:5, 828:7, 828:10, 832:19, 833:3, 834:21</p>
G				
<p>Ganey [2] - 725:2, 725:10 Garner [8] - 644:14, 647:19, 722:2, 779:7, 779:17, 779:22, 784:17, 823:12 gas [18] - 625:19, 660:3, 665:21, 666:7, 765:7, 770:20, 772:1, 774:2, 780:1, 780:19, 794:15, 802:9, 804:11, 814:4, 818:1, 824:25, 827:1 gear [38] - 610:18, 614:25, 615:3, 615:19, 763:14, 765:4, 766:6, 766:7, 766:9, 766:19, 770:15, 773:2, 773:5, 773:6, 773:12, 773:17, 774:1, 775:17, 777:13, 777:25, 783:16, 789:5, 789:6, 800:6, 802:11, 802:12, 802:13, 803:24,</p>				

<p>Georgia ^[1] - 809:6 girl ^[1] - 703:25 Given ^[1] - 836:12 given ^[23] - 618:10, 618:20, 618:22, 619:2, 619:13, 630:12, 677:6, 679:11, 716:15, 717:25, 718:16, 718:18, 718:19, 727:14, 739:19, 747:20, 751:17, 757:8, 814:16, 821:17, 830:19, 833:6, 835:14 glad ^[1] - 682:19 glass ^[1] - 671:2 Glasser ^[1] - 607:18 God ^[3] - 654:20, 677:18, 783:4 God's ^[1] - 627:19 govern ^[1] - 614:12 governed ^[2] - 612:2, 741:16 government ^[7] - 646:12, 753:25, 763:24, 763:25, 764:4, 770:2, 778:3 governor's ^[2] - 628:3, 628:22 governs ^[1] - 780:14 grab ^[3] - 714:25, 715:13, 787:14 Graham ^[9] - 644:18, 645:16, 658:10, 667:14, 667:16, 672:22, 673:16, 675:7, 702:22 grandfather's ^[1] - 820:12 grant ^[2] - 618:24, 619:16 granted ^[1] - 635:25 granting ^[1] - 737:24 graph ^[1] - 651:11 graphic ^[1] - 650:22 grasp ^[1] - 773:19 grass ^[12] - 695:18, 695:23, 696:3, 696:5, 770:21, 771:9, 771:13, 772:5, 772:7, 773:23, 824:22 gravel ^[3] - 767:17, 767:18, 771:25 great ^[1] - 648:3 greater ^[6] - 731:3, 742:23, 742:24, 746:13, 751:2, 751:7 greatest ^[3] - 645:18,</p>	<p>650:18, 788:11 Green ^[1] - 665:15 green ^[4] - 651:5, 652:1, 652:9, 708:19 Greenbag ^[1] - 607:16 greenish ^[2] - 651:6, 652:10 grew ^[2] - 627:17, 791:7 ground ^[20] - 615:21, 669:19, 673:23, 674:2, 695:6, 695:8, 695:10, 699:2, 699:3, 699:20, 700:11, 701:20, 767:24, 768:1, 768:2, 768:3, 781:4, 807:13, 807:16, 807:21 grounds ^[3] - 722:6, 722:9, 737:25 groups ^[2] - 762:10, 789:15 grown ^[1] - 771:4 guarantee ^[2] - 661:21, 669:18 guaranteed ^[1] - 748:7 guess ^[10] - 637:9, 644:7, 649:18, 660:2, 662:7, 662:20, 666:4, 686:8, 765:14, 831:21 guessing ^[2] - 661:24, 736:14 guesswork ^[1] - 757:22 guidance ^[2] - 754:2, 757:8 guide ^[1] - 756:20 guidelines ^[8] - 621:12, 644:22, 659:13, 674:25, 675:21, 679:22, 712:17, 817:18 Guidelines ^[2] - 673:8, 673:16 Gumball ^[1] - 655:13 gun ^[6] - 645:14, 648:19, 691:2, 691:13, 691:25, 824:20 Gundy ^[1] - 628:23 gunshot ^[2] - 768:23, 808:23 gunshots ^[1] - 827:23 guy ^[2] - 768:25, 780:20 guys ^[10] - 626:11, 681:13, 714:25,</p>	<p>715:2, 735:10, 825:15, 829:19, 830:23, 831:15, 832:2 H habit ^[1] - 669:24 half ^[6] - 654:19, 666:10, 666:11, 731:1, 764:11, 786:3 hall ^[1] - 647:18 hallmark ^[1] - 611:20 hammer ^[1] - 831:2 hand ^[15] - 617:24, 618:7, 629:11, 633:19, 635:12, 645:22, 652:16, 652:19, 668:13, 684:4, 691:9, 808:20, 832:25, 836:12 handle ^[2] - 677:13, 822:19 handled ^[1] - 832:3 hands ^[10] - 636:15, 768:25, 808:24, 809:8, 809:9, 814:9, 814:10, 814:12, 814:13, 814:17 handwork ^[1] - 728:22 hang ^[1] - 835:5 happy ^[2] - 824:13, 829:19 hard ^[18] - 651:2, 681:1, 681:2, 687:14, 688:6, 688:7, 688:10, 729:17, 735:22, 767:4, 772:14, 775:10, 803:25, 825:7, 825:13, 825:15, 827:9, 835:1 hardest ^[1] - 783:20 harm ^[11] - 621:11, 622:10, 622:15, 659:11, 753:16, 753:19, 753:22, 756:7, 756:9, 756:16, 764:6 harm's ^[5] - 620:18, 654:4, 655:4, 658:12, 658:19 harmed ^[1] - 755:10 have ^[1] - 707:10 Hazard ^[2] - 771:22, 779:15 head ^[5] - 641:22, 650:1, 677:14, 777:4, 824:5</p>	<p>heading ^[1] - 708:19 heads ^[2] - 738:23, 830:7 health ^[2] - 753:17, 755:18 hear ^[10] - 626:22, 641:24, 659:20, 739:25, 745:14, 762:7, 801:14, 813:10, 818:23 heard ^[69] - 609:24, 611:22, 614:23, 624:14, 631:7, 642:23, 654:7, 654:10, 656:5, 656:24, 657:1, 657:9, 658:14, 658:22, 659:20, 659:23, 662:22, 672:25, 673:5, 675:16, 678:5, 679:15, 693:7, 694:20, 694:21, 696:18, 701:1, 703:17, 703:24, 722:4, 733:17, 734:7, 735:7, 736:17, 736:21, 736:23, 737:14, 737:18, 739:15, 739:20, 740:8, 741:11, 742:25, 744:12, 744:17, 746:14, 765:4, 765:18, 766:13, 769:2, 774:23, 781:9, 785:8, 789:12, 790:25, 791:20, 791:23, 791:24, 793:2, 794:6, 796:18, 802:24, 815:6, 816:18, 818:22, 821:13 hearing ^[3] - 636:17, 799:25, 804:10 hearings ^[1] - 620:17 hears ^[2] - 826:16, 827:23 heavily ^[2] - 777:22 heavy ^[1] - 824:25 heels ^[1] - 685:2 held ^[1] - 691:15 help ^[2] - 712:24, 811:16 hereby ^[1] - 836:5 herring ^[1] - 809:2 herself ^[1] - 746:3 hesitate ^[1] - 758:20 hesitation ^[1] - 791:21</p>	<p>hidden ^[1] - 770:25 hide ^[1] - 825:18 hiding ^[3] - 670:9, 771:17, 780:1 high ^[18] - 620:19, 620:22, 620:23, 621:2, 633:20, 641:23, 646:12, 654:4, 655:5, 655:19, 656:3, 658:13, 664:15, 736:19, 793:9, 798:19, 811:11, 827:4 higher ^[1] - 769:3 highlighting ^[1] - 724:3 highly ^[5] - 621:13, 622:16, 655:11, 736:15, 767:20 Highway ^[1] - 666:2 hill ^[3] - 667:2, 794:13, 818:2 hillside ^[1] - 773:21 himself ^[12] - 620:18, 621:3, 654:3, 655:4, 658:12, 658:19, 736:25, 746:2, 771:16, 791:15, 793:15, 796:5 hindsight ^[6] - 667:18, 750:3, 794:9, 813:21, 817:23, 822:12 hired ^[3] - 630:17, 631:2, 650:23 history ^[1] - 782:2 hit ^[16] - 621:24, 669:19, 671:2, 671:20, 671:24, 691:7, 696:22, 699:14, 729:22, 738:18, 773:17, 776:19, 777:11, 787:9, 805:1, 814:6 hits ^[1] - 777:2 hitting ^[3] - 655:25, 658:22, 818:4 Hobby ^[1] - 725:9 HOGAN ^[9] - 719:15, 720:1, 722:1, 722:5, 723:9, 727:14, 729:8, 730:3, 730:23 Hogan ^[12] - 607:18, 719:13, 719:14, 720:5, 721:25, 722:25, 727:13, 728:9, 729:24, 730:22, 785:25, 786:1</p>
---	---	--	---	--

<p>Hogan's [1] - 732:1 hold [3] - 679:11, 690:4, 713:12 home [3] - 673:1, 787:14, 796:11 honest [5] - 640:15, 758:22, 825:13, 825:15, 831:6 honor [2] - 790:20, 827:10 Honor [130] - 609:8, 609:11, 611:12, 611:25, 613:10, 613:17, 613:20, 613:22, 613:24, 614:3, 614:11, 614:15, 615:4, 615:23, 616:12, 616:20, 616:23, 617:13, 619:21, 619:23, 620:2, 620:11, 620:15, 621:22, 622:4, 622:22, 623:18, 623:22, 624:5, 624:7, 624:12, 625:5, 625:8, 625:11, 625:17, 626:4, 626:6, 627:1, 627:10, 637:12, 637:18, 639:3, 639:5, 639:8, 639:18, 649:23, 678:24, 679:25, 681:19, 682:3, 685:10, 685:13, 689:21, 690:3, 690:6, 712:1, 712:3, 713:16, 713:18, 713:22, 713:24, 714:23, 715:20, 719:2, 719:13, 720:3, 720:6, 721:5, 721:9, 722:1, 723:12, 724:14, 724:15, 724:17, 724:20, 725:1, 726:17, 727:14, 728:4, 728:7, 729:5, 729:8, 729:12, 730:3, 730:23, 731:11, 732:11, 732:25, 733:2, 733:14, 733:21, 733:23, 734:14, 734:18, 734:21, 735:2, 735:18, 736:6, 738:15, 738:17, 739:3, 739:5, 739:8,</p>	<p>762:21, 762:23, 763:6, 763:7, 786:5, 786:21, 786:22, 786:25, 787:17, 787:20, 787:24, 790:6, 796:21, 798:9, 798:11, 810:21, 822:20, 822:22, 830:9, 830:16, 830:17, 831:14, 831:19, 832:1, 832:12, 835:20, 835:22 Honorable [1] - 607:12 hoodwinked [1] - 768:15 Hoover [2] - 612:16, 612:19 hop [1] - 775:25 hopefully [2] - 715:12, 729:15 hopelessly [1] - 829:23 hopes [1] - 770:12 hoping [3] - 764:23, 768:9, 773:18 hopped [2] - 771:7, 826:23 Hospital [1] - 630:4 hotshot [1] - 652:12 hour [19] - 640:3, 640:5, 654:19, 660:24, 661:17, 661:18, 661:21, 665:10, 665:11, 665:12, 665:13, 666:9, 666:10, 685:5, 731:1, 767:13, 835:4, 835:15 hours [9] - 640:2, 654:17, 792:12, 799:15, 816:10, 824:16, 829:22, 830:20 house [1] - 820:12 human [10] - 634:14, 645:12, 645:15, 664:23, 665:22, 666:15, 668:3, 668:7, 704:13, 763:23 humanly [3] - 666:18, 669:15, 672:14 humiliation [1] - 753:23 hundred [1] - 796:13 hundreds [3] - 686:12, 686:17, 781:24</p>	<p>hurt [1] - 668:14 hurting [1] - 631:8 hypothermia [1] - 612:20 hypothesis [1] - 767:3 hypothetical [8] - 690:16, 697:11, 697:12, 697:14, 697:18, 697:21, 698:4, 698:19 I idea [7] - 670:10, 672:13, 695:9, 793:1, 815:16, 816:4, 816:5 ideas [1] - 795:16 identical [1] - 677:20 identified [4] - 616:25, 618:2, 639:11, 732:13 identify [4] - 627:13, 721:12, 732:13, 825:24 ignore [6] - 743:25, 767:1, 772:12, 772:13, 800:20, 800:23 ignored [1] - 772:15 ill [1] - 753:17 imagine [1] - 731:3 immediate [9] - 622:13, 622:18, 625:22, 668:17, 708:18, 749:22, 750:17, 750:24, 778:16 immediately [7] - 652:8, 731:24, 735:9, 753:14, 805:4, 814:5, 829:8 imminent [7] - 621:16, 621:17, 622:6, 778:11, 778:15, 778:18, 778:21 immunity [18] - 613:13, 715:22, 717:13, 717:20, 717:24, 718:1, 723:14, 723:18, 723:20, 723:23, 724:2, 724:10, 730:8, 736:7, 737:20, 737:25, 738:6, 738:11 impact [1] - 655:3 impacted [1] - 658:6 impair [1] - 806:17 impaneled [1] - 724:4</p>	<p>impart [1] - 816:4 impartial [1] - 758:18 impartially [1] - 741:18 impeach [2] - 689:24, 745:24 impeached [4] - 745:2, 745:21, 747:9, 747:12 imperfect [1] - 763:24 implication [1] - 791:8 imply [1] - 757:5 implying [1] - 791:4 importance [1] - 745:17 important [3] - 636:8, 769:8, 776:5 importantly [1] - 611:25 impose [1] - 828:24 impossibility [1] - 610:19 impossible [4] - 683:15, 699:6, 699:12 improper [1] - 743:23 improve [1] - 681:7 inability [1] - 731:19 inappropriate [2] - 725:3, 738:6 inches [2] - 660:5, 660:6 incident [20] - 610:23, 625:3, 631:24, 636:21, 644:11, 645:10, 647:13, 647:17, 657:11, 666:24, 678:10, 678:17, 720:9, 720:11, 720:19, 737:4, 745:13, 798:2, 802:6, 808:21 incidents [3] - 635:12, 647:11, 825:19 inclined [2] - 728:9, 831:4 include [6] - 643:5, 673:16, 721:18, 723:14, 754:1, 830:24 included [2] - 732:4, 801:12 includes [3] - 617:21, 721:10, 721:18 including [13] - 609:17, 615:20, 714:11, 729:17, 730:8, 749:21, 753:17, 753:23, 754:3, 754:22,</p>	<p>762:9, 789:14, 807:23 income [2] - 772:19, 772:20 inconsistencies [17] - 610:25, 745:10, 772:16, 797:6, 797:9, 798:23, 799:16, 799:22, 799:23, 801:4, 806:1, 806:20, 807:11, 807:12, 808:18, 810:16 inconsistency [5] - 799:18, 806:22, 807:7, 809:15, 809:21 inconsistent [10] - 610:22, 610:24, 642:4, 675:8, 721:16, 737:11, 737:13, 745:22, 747:11, 799:17 incorporate [2] - 716:9, 726:20 incorporated [18] - 716:8, 716:20, 716:23, 717:7, 717:9, 717:10, 717:12, 717:16, 717:17, 717:21, 717:22, 717:23, 718:2, 718:6, 718:9, 718:12, 718:21, 726:21 incorrect [1] - 683:12 increases [1] - 656:1 incurred [1] - 756:1 indeed [1] - 737:6 independent [7] - 680:12, 714:12, 746:21, 747:20, 747:22, 762:11, 789:16 INDEX [1] - 608:1 Indiana [2] - 628:13, 647:17 indicate [8] - 614:17, 614:19, 687:6, 698:13, 724:11, 735:19, 767:4, 776:15 indicated [5] - 729:14, 746:3, 802:18, 807:10, 813:16 indicates [1] - 764:25 indicating [2] - 703:15, 722:20 indication [1] - 611:13 indifference [19] -</p>
---	---	--	---	--

<p>609:23, 610:2, 610:5, 613:23, 613:25, 614:11, 615:6, 618:4, 618:16, 725:25, 726:12, 754:19, 755:6, 755:18, 760:18, 784:12, 784:13, 784:16, 822:2</p> <p>indirect [1] - 743:7</p> <p>indiscernible [4] - 624:4, 652:18, 737:7, 827:4</p> <p>individual [20] - 607:9, 641:14, 652:4, 652:21, 664:16, 677:24, 692:21, 692:22, 709:2, 711:8, 741:7, 758:16, 779:7, 779:8, 779:13, 779:14, 798:18, 813:4, 814:1, 814:10</p> <p>individual's [2] - 651:19, 678:2</p> <p>individually [2] - 833:8, 833:9</p> <p>individuals [7] - 629:15, 650:14, 676:23, 687:19, 688:5, 816:20, 816:22</p> <p>inducing [4] - 678:1, 793:13, 794:3, 798:19</p> <p>infallible [1] - 763:21</p> <p>infer [3] - 610:5, 663:11, 726:11</p> <p>inference [1] - 744:21</p> <p>inferences [3] - 617:21, 721:15, 744:19</p> <p>inferred [1] - 726:1</p> <p>infliction [14] - 609:14, 611:17, 611:19, 611:21, 612:21, 613:2, 613:3, 616:2, 616:16, 618:20, 618:25, 619:17, 718:4, 728:23</p> <p>influenced [2] - 743:24, 747:23</p> <p>inform [2] - 759:22, 760:21</p> <p>information [43] - 621:4, 621:5, 621:6, 624:11, 624:14, 641:6, 644:1, 644:2,</p>	<p>644:22, 648:8, 653:14, 653:22, 655:3, 658:14, 663:22, 667:21, 671:23, 673:2, 673:3, 673:5, 673:6, 674:23, 678:19, 693:13, 707:17, 707:22, 708:18, 712:15, 774:7, 774:8, 794:14, 801:10, 802:1, 802:2, 802:7, 814:23, 815:6, 816:14, 816:25, 817:25, 818:3, 818:6, 822:14</p> <p>informed [6] - 623:15, 656:25, 661:15, 693:13, 708:24, 709:4</p> <p>infringed [1] - 725:13</p> <p>inherently [1] - 621:7</p> <p>initial [5] - 611:18, 619:16, 621:21, 623:5, 831:24</p> <p>injured [1] - 752:4</p> <p>injuries [3] - 612:25, 752:23, 755:14</p> <p>injury [15] - 612:2, 622:10, 749:24, 750:18, 750:25, 752:15, 753:11, 753:20, 754:10, 754:12, 766:14, 778:12, 778:13</p> <p>inmate [1] - 612:19</p> <p>innocent [2] - 745:14, 745:18</p> <p>inquiry [1] - 750:6</p> <p>inside [2] - 671:2, 767:8</p> <p>inspect [1] - 833:4</p> <p>instance [3] - 652:1, 688:9, 707:25</p> <p>instances [2] - 771:20, 771:21</p> <p>instant [2] - 748:13, 749:6</p> <p>instantaneous [3] - 611:23, 730:18, 753:4</p> <p>instantaneously [5] - 766:15, 804:22, 805:6, 805:17, 805:20</p> <p>instantly [3] - 775:20, 775:21</p> <p>instead [1] - 641:12</p> <p>Institute [6] - 634:9,</p>	<p>634:12, 634:21, 634:25, 665:17, 817:13</p> <p>instruct [6] - 629:10, 684:9, 718:15, 723:19, 725:3, 740:9</p> <p>instructed [14] - 721:24, 726:3, 732:4, 743:17, 744:2, 751:15, 754:13, 754:15, 755:2, 757:4, 765:25, 784:21, 790:24, 822:12</p> <p>instruction [20] - 680:18, 716:6, 716:9, 716:19, 716:22, 717:5, 717:18, 718:8, 718:14, 720:8, 720:12, 720:15, 720:22, 721:3, 721:18, 722:7, 724:20, 726:24, 740:14, 744:3</p> <p>instructions [35] - 680:11, 681:5, 715:5, 715:10, 715:14, 716:2, 716:4, 716:25, 717:10, 718:23, 718:24, 719:4, 719:11, 720:24, 723:14, 724:13, 732:12, 732:21, 735:9, 735:10, 739:22, 740:3, 740:15, 740:16, 741:9, 757:7, 759:9, 759:13, 761:9, 761:23, 763:20, 794:8, 819:4, 821:18, 829:13</p> <p>instructor [1] - 684:7</p> <p>instructs [1] - 729:18</p> <p>insult [1] - 768:7</p> <p>insulted [1] - 772:23</p> <p>insure [2] - 832:8, 833:10</p> <p>intangible [1] - 753:12</p> <p>intelligence [3] - 745:3, 768:7, 772:24</p> <p>intend [2] - 623:21, 624:4</p> <p>intended [1] - 615:8</p> <p>intense [1] - 736:15</p> <p>intensive [2] - 629:24, 634:16</p> <p>intent [20] - 609:23, 610:2, 610:5,</p>	<p>611:13, 614:1, 615:6, 618:3, 618:13, 725:22, 726:2, 726:4, 726:19, 732:17, 750:9, 754:19, 755:5, 760:16, 784:11, 821:20</p> <p>intentional [17] - 609:13, 611:17, 611:19, 611:21, 612:21, 613:2, 616:2, 616:16, 618:19, 618:25, 619:17, 717:25, 718:4, 727:2, 728:23, 745:19</p> <p>intentionally [4] - 614:9, 615:8, 720:18, 751:13</p> <p>intentions [2] - 750:10, 750:12</p> <p>interaction [1] - 820:5</p> <p>interest [1] - 759:3</p> <p>interesting [1] - 822:24</p> <p>interjecting [1] - 698:11</p> <p>interlocutory [1] - 724:2</p> <p>internal [1] - 799:22</p> <p>International [2] - 676:22, 684:1</p> <p>interpretation [1] - 807:6</p> <p>interpreted [1] - 679:9</p> <p>interpreting [1] - 807:4</p> <p>interrogation [1] - 641:12</p> <p>interview [3] - 623:7, 641:12, 641:13</p> <p>interviewed [2] - 623:6, 709:5</p> <p>interviews [1] - 708:25</p> <p>intoxicating [1] - 677:2</p> <p>introduce [2] - 698:24, 700:21</p> <p>introduced [4] - 698:22, 800:9, 807:24</p> <p>introducing [1] - 700:13</p> <p>investigating [1] - 694:7</p> <p>investigation [14] - 643:3, 653:15, 678:16, 680:13, 714:13, 762:11,</p>	<p>789:1, 789:16, 789:17, 800:5, 801:11, 801:16, 802:6, 816:15</p> <p>investigator [1] - 774:9</p> <p>invites [1] - 722:10</p> <p>involve [3] - 609:23, 754:19, 825:20</p> <p>involved [12] - 619:6, 640:7, 654:9, 655:2, 677:25, 736:15, 746:4, 755:6, 760:17, 784:11, 822:1, 834:24</p> <p>involvement [3] - 619:13, 628:17, 634:11</p> <p>involves [1] - 618:3</p> <p>irrelevant [2] - 625:20, 734:5</p> <p>isolated [1] - 827:1</p> <p>issue [37] - 610:13, 617:25, 620:20, 620:21, 621:1, 623:1, 669:10, 671:13, 671:24, 676:17, 678:9, 707:3, 718:1, 721:21, 724:17, 725:18, 726:23, 727:18, 728:3, 730:12, 731:21, 732:12, 748:11, 748:12, 749:16, 752:13, 753:7, 753:17, 761:20, 769:22, 770:13, 798:17, 809:10, 821:16, 823:12, 823:14</p> <p>issues [9] - 623:13, 623:16, 714:13, 729:16, 730:1, 732:23, 762:12, 789:17, 819:25</p> <p>item [5] - 639:20, 730:13, 730:15, 731:13, 757:16</p> <p>items [2] - 734:1, 753:16</p> <p>itself [2] - 689:12, 799:17</p>
J				
<p>Jacob [1] - 683:21</p> <p>jail [1] - 612:20</p> <p>January [1] - 717:1</p> <p>Jeep [175] - 610:17,</p>				

617:4, 621:23, 624:2, 624:16, 641:19, 657:2, 657:17, 657:20, 657:22, 657:23, 658:4, 660:8, 663:3, 664:5, 664:6, 664:8, 664:13, 664:15, 664:22, 665:7, 667:3, 667:6, 667:25, 671:19, 671:20, 671:24, 672:2, 672:6, 672:14, 672:15, 674:4, 674:5, 675:3, 678:22, 688:9, 688:12, 688:19, 688:21, 688:25, 694:23, 695:7, 695:11, 696:3, 696:10, 696:20, 696:25, 697:6, 697:10, 697:15, 697:20, 697:25, 698:9, 698:17, 699:7, 699:14, 699:23, 701:23, 703:1, 703:5, 704:7, 705:6, 705:8, 705:10, 705:11, 705:12, 706:24, 708:5, 708:6, 708:8, 708:11, 709:17, 709:23, 710:6, 710:18, 710:19, 710:22, 710:24, 720:21, 721:12, 736:24, 763:14, 764:17, 764:18, 765:1, 765:4, 765:21, 766:8, 766:11, 768:4, 768:19, 770:14, 770:17, 771:8, 772:3, 773:2, 773:23, 773:25, 775:9, 775:10, 775:11, 777:1, 777:25, 779:12, 780:11, 780:16, 780:23, 781:3, 783:15, 783:16, 783:18, 789:5, 789:6, 793:18, 795:2, 795:13, 797:4, 800:6, 800:10, 800:13, 800:17, 800:23, 801:18, 802:14, 802:17, 803:14, 803:20, 804:5,	804:19, 805:13, 805:23, 807:18, 809:16, 809:20, 809:22, 809:24, 810:4, 810:12, 810:15, 811:19, 811:24, 812:16, 812:24, 813:4, 813:6, 813:8, 813:12, 813:15, 814:1, 814:5, 814:6, 814:7, 814:10, 814:18, 815:10, 815:12, 818:4, 818:6, 822:15, 823:9, 823:14, 823:15, 824:1, 824:7, 824:10, 824:24, 826:11, 826:14, 826:20 Jeep's [4] - 695:17, 696:13, 771:7, 810:6 Jeeps [2] - 667:4, 771:8 Jersey [1] - 627:17 Jess [1] - 628:23 Jill [2] - 836:3, 836:14 job [16] - 638:11, 638:15, 646:16, 683:8, 684:16, 712:21, 781:18, 781:20, 782:1, 783:3, 819:12, 819:14, 821:15, 822:7, 822:9, 825:16 jog [1] - 694:13 Jontz [31] - 607:5, 724:24, 730:16, 734:17, 748:5, 748:6, 748:22, 749:4, 750:21, 751:23, 752:6, 752:7, 752:14, 752:18, 752:19, 752:21, 752:23, 753:1, 753:15, 754:5, 754:6, 755:7, 759:16, 760:4, 760:6, 760:18, 783:14, 784:1, 818:14, 833:20 JP [1] - 693:4 judge [10] - 635:11, 635:17, 635:22, 743:1, 765:25, 771:2, 781:23, 783:9, 818:7, 822:11 Judge [9] - 607:12, 607:13, 794:8, 795:8, 811:1,	813:19, 817:19, 819:4, 821:17 judged [1] - 750:2 judgement [1] - 609:9 judges [3] - 744:24, 759:2 judgment [14] - 610:9, 635:15, 635:21, 635:25, 717:23, 736:6, 737:22, 737:24, 747:6, 758:12, 758:17, 783:4, 783:5, 835:14 Judicial [1] - 736:14 Judicial [1] - 836:10 July [7] - 622:24, 623:1, 623:3, 623:8, 623:17, 624:5, 720:10 jump [4] - 651:8, 651:10, 651:17, 771:9 jumped [9] - 614:8, 665:24, 698:15, 704:20, 780:3, 780:20, 826:12, 827:3, 828:1 jumping [2] - 656:7, 826:8 jumps [2] - 826:19, 827:5 JUROR [8] - 834:4, 834:6, 834:8, 834:10, 834:12, 834:14, 834:16, 834:18 juror [10] - 610:5, 737:18, 741:7, 742:11, 747:21, 758:12, 758:13, 834:3, 834:5, 834:9 Juror [5] - 834:7, 834:11, 834:13, 834:15, 834:17 jurors [19] - 649:23, 714:11, 729:18, 740:11, 740:25, 741:12, 741:15, 744:24, 747:23, 758:14, 758:19, 758:24, 759:3, 762:9, 762:10, 790:11, 790:16, 832:7, 833:24 Jury [6] - 607:12, 681:23, 763:9, 789:21, 790:1, 828:20 jury [142] - 609:24, 611:5, 611:20,	614:6, 617:22, 618:15, 620:25, 623:12, 625:13, 626:12, 626:14, 626:16, 627:14, 627:21, 628:17, 629:22, 631:15, 631:19, 632:6, 632:11, 633:16, 634:11, 635:12, 635:13, 636:7, 637:22, 640:7, 640:17, 640:20, 641:10, 642:4, 643:20, 644:6, 646:21, 647:3, 650:6, 650:13, 653:23, 654:12, 655:7, 656:14, 659:17, 659:20, 663:22, 673:11, 673:14, 679:11, 680:3, 680:15, 681:12, 681:16, 681:22, 685:6, 685:19, 688:7, 692:1, 695:9, 702:24, 712:12, 714:17, 717:15, 717:22, 718:15, 721:15, 721:23, 721:24, 723:19, 723:23, 724:4, 724:7, 724:9, 725:3, 725:6, 725:11, 726:3, 726:11, 726:15, 730:9, 730:20, 731:7, 732:3, 732:7, 733:17, 734:4, 735:5, 735:12, 736:17, 737:17, 738:21, 739:10, 739:23, 740:3, 740:17, 741:6, 742:19, 743:5, 743:11, 743:19, 744:22, 745:12, 756:10, 757:7, 758:2, 759:5, 759:12, 761:5, 761:6, 761:12, 761:22, 761:24, 762:5, 762:17, 763:8, 763:19, 771:2, 789:15, 790:8, 795:9, 801:15, 810:24, 819:17, 823:13, 828:10, 828:11, 828:13, 829:13,	829:14, 832:3, 832:10, 832:15, 832:16, 832:19, 832:23, 833:3, 833:16, 833:21, 834:21, 835:2, 835:4, 835:10 JURY [1] - 832:24 jury's [1] - 702:16 justice [3] - 741:24, 827:20, 828:7 justification [1] - 699:24 justified [5] - 708:12, 709:25, 798:1, 799:2, 799:10 justify [2] - 744:20, 758:2
K				
keep [11] - 630:24, 677:13, 681:3, 713:5, 731:6, 734:15, 773:11, 774:3, 830:13, 831:3 Kent [4] - 630:9, 630:11, 630:12 kept [6] - 632:1, 671:9, 766:9, 785:23, 787:12, 807:20 kernels [1] - 731:22 key [1] - 818:15 kicked [4] - 690:20, 691:21, 803:24, 804:3 kicking [1] - 648:18 kicks [1] - 774:1 kid [2] - 654:18, 786:11 kids [5] - 630:25, 673:1, 734:3, 771:3, 788:11 kill [5] - 670:23, 711:5, 711:16, 827:12 killed [17] - 658:3, 669:3, 669:4, 688:16, 689:1, 700:15, 700:23, 711:19, 711:21, 780:21, 780:22, 785:1, 791:21, 796:19, 797:1, 825:10 killing [4] - 708:12, 766:3, 766:6, 798:1 kills [2] - 824:17, 827:5 kind [31] - 623:9, 629:19, 630:4,				

<p>630:23, 637:1, 639:20, 640:6, 640:17, 641:10, 641:12, 642:17, 644:5, 648:5, 669:8, 671:17, 673:11, 673:23, 674:5, 674:15, 700:17, 701:25, 706:1, 785:11, 791:8, 792:11, 795:8, 804:25, 805:8, 816:19, 827:11 kindly [1] - 754:2 kinds [3] - 639:23, 690:21, 691:22 kinesiology [1] - 645:12 Kingwood [1] - 771:24 Kiwanis [1] - 646:11 Kleeh [1] - 607:13 knock [1] - 777:13 knocked [1] - 805:22 knowing [4] - 655:19, 731:5, 768:14, 815:16 knowingly [3] - 614:8, 746:1, 747:13 knowledge [2] - 746:18, 763:23 known [9] - 610:12, 636:13, 658:9, 667:11, 706:7, 706:23, 736:10, 804:17, 813:22 knows [21] - 635:12, 635:13, 655:9, 661:18, 661:23, 662:9, 662:11, 663:5, 664:11, 665:7, 666:14, 675:11, 698:3, 699:21, 707:12, 729:14, 763:20, 780:12, 788:11, 815:13 Kokomo [1] - 647:17</p>	<p>769:25, 772:24, 773:10, 775:23, 777:14, 777:25, 781:9, 782:6, 782:15, 782:22, 783:3, 783:16, 784:23, 787:23, 788:17, 789:5, 789:9, 790:3, 790:8, 791:2, 791:8, 791:13, 791:22, 792:4, 793:20, 795:20, 796:2, 796:17, 798:6, 799:18, 804:18, 805:15, 806:2, 808:12, 809:2, 812:25, 813:24, 815:4, 816:9, 818:9, 818:21, 819:12, 820:4, 820:19, 820:25, 821:8, 822:3, 825:12, 827:20, 828:5, 828:7, 828:10, 832:19, 833:3, 834:21 Ladies [2] - 647:15, 680:6 lady [1] - 635:16 laid [1] - 664:12 lane [2] - 621:25, 818:5 language [2] - 731:13, 831:12 large [1] - 797:7 largely [2] - 717:24, 721:7 last [11] - 649:1, 721:6, 723:21, 738:1, 762:7, 784:1, 784:4, 787:22, 789:12, 796:18, 819:7 lasted [1] - 790:9 lastly [6] - 613:4, 684:11, 753:25, 760:5, 761:4, 821:16 latch [2] - 768:10, 778:19 latched [1] - 800:7 late [3] - 625:14, 835:4, 835:15 latter [1] - 831:5 laugh [1] - 668:14 law [107] - 609:9, 609:21, 610:6, 610:9, 611:18, 614:4, 616:7, 616:12, 619:11,</p>	<p>619:13, 620:8, 627:23, 628:1, 629:2, 629:23, 630:1, 630:20, 632:8, 632:12, 632:15, 632:19, 632:23, 632:25, 633:2, 633:10, 636:5, 637:8, 637:14, 644:13, 644:14, 646:15, 648:11, 648:12, 655:11, 659:13, 669:25, 670:3, 670:14, 684:2, 686:6, 687:1, 687:4, 691:18, 713:3, 716:16, 717:5, 717:19, 718:16, 720:14, 720:15, 721:24, 722:19, 722:20, 723:24, 724:3, 725:2, 725:6, 726:6, 726:15, 727:4, 727:5, 727:7, 727:16, 727:25, 728:2, 728:12, 736:7, 736:10, 739:22, 740:10, 740:11, 740:12, 740:15, 740:20, 740:23, 740:25, 741:1, 741:2, 741:9, 741:13, 741:15, 741:19, 741:23, 743:9, 748:2, 748:6, 748:11, 748:24, 748:25, 749:17, 751:14, 751:17, 757:4, 766:22, 771:19, 772:18, 778:5, 778:6, 779:21, 780:13, 788:15, 793:4, 796:12, 814:25, 817:19 Law [7] - 673:9, 673:19, 674:25, 675:21, 679:22, 712:18, 817:18 lawful [1] - 754:4 laws [1] - 778:25 lawsuit [3] - 742:9, 751:24, 786:17 lawyer [2] - 631:21, 640:15 lawyers [2] - 743:21, 832:7 laying [2] - 731:4, 766:9</p>	<p>lead [1] - 744:22 leading [5] - 720:24, 737:3, 767:25, 820:6, 820:23 leaning [2] - 803:4, 803:6 learn [1] - 636:20 learned [6] - 635:7, 657:18, 775:16, 800:14, 803:23, 813:21 least [11] - 624:18, 634:2, 662:3, 663:20, 682:10, 698:7, 706:18, 722:20, 731:24, 831:7, 831:8 leave [8] - 620:4, 732:21, 734:22, 782:11, 816:16, 816:17, 829:7 leaving [1] - 629:21 led [3] - 619:10, 720:10, 825:6 left [12] - 652:2, 664:10, 668:17, 680:15, 694:23, 695:6, 695:11, 776:7, 776:22, 777:4, 789:21, 810:7 legal [2] - 611:20, 619:16 Legal [1] - 607:15 legally [3] - 617:17, 618:14, 738:4 legislative [2] - 728:13, 728:22 legislature [1] - 728:16 legs [8] - 775:20, 805:7, 824:6, 824:7, 824:9, 824:15, 824:16, 824:19 length [2] - 708:3, 765:22 lengthy [2] - 729:15, 729:19 less [7] - 651:8, 651:17, 653:4, 725:5, 786:10, 786:13, 829:22 lethal [4] - 614:9, 614:13, 625:21, 778:9 level [3] - 614:14, 645:1, 736:11 leveled [1] - 790:21 Lewinski [1] - 634:15 LEXIS [1] - 612:17 liability [6] - 613:24,</p>	<p>618:7, 618:9, 757:12, 785:6, 823:9 liable [4] - 752:12, 764:5, 764:6, 780:10 lie [10] - 685:6, 693:13, 712:21, 746:3, 768:23, 769:17, 769:24, 781:22, 781:25, 782:3 lied [16] - 682:16, 683:16, 684:23, 693:7, 693:14, 709:10, 709:12, 768:22, 768:25, 769:7, 769:9, 769:10, 781:16, 808:2, 812:3, 812:12 lies [5] - 770:4, 781:13, 781:14, 808:3, 812:3 lieutenant [2] - 713:7, 802:1 Lieutenant [43] - 631:6, 642:20, 642:25, 643:3, 663:5, 675:10, 678:9, 678:16, 678:17, 693:4, 693:10, 699:4, 700:21, 701:4, 701:12, 701:16, 709:8, 709:11, 709:14, 768:11, 768:16, 768:20, 769:13, 769:18, 775:15, 798:2, 799:13, 799:24, 800:4, 800:12, 800:16, 800:19, 800:21, 801:22, 802:5, 805:25, 810:14, 812:4, 812:7, 815:25, 816:6, 825:3 life [32] - 614:2, 615:25, 616:4, 636:22, 704:13, 711:20, 731:5, 764:6, 765:2, 765:3, 770:19, 774:20, 778:3, 783:24, 784:2, 784:4, 784:15, 785:17, 785:19, 786:8, 786:9, 786:10, 786:12, 786:20, 788:12, 788:16, 788:19, 788:20, 788:23, 793:14, 825:17</p>
L				
<p>lacerated [1] - 805:10 lack [2] - 690:2, 718:16 Laconne [1] - 713:1 ladies [66] - 626:18, 626:20, 639:12, 646:14, 714:2, 739:12, 739:14, 740:9, 761:22, 763:14, 763:15,</p>	<p>769:25, 772:24, 773:10, 775:23, 777:14, 777:25, 781:9, 782:6, 782:15, 782:22, 783:3, 783:16, 784:23, 787:23, 788:17, 789:5, 789:9, 790:3, 790:8, 791:2, 791:8, 791:13, 791:22, 792:4, 793:20, 795:20, 796:2, 796:17, 798:6, 799:18, 804:18, 805:15, 806:2, 808:12, 809:2, 812:25, 813:24, 815:4, 816:9, 818:9, 818:21, 819:12, 820:4, 820:19, 820:25, 821:8, 822:3, 825:12, 827:20, 828:5, 828:7, 828:10, 832:19, 833:3, 834:21 Ladies [2] - 647:15, 680:6 lady [1] - 635:16 laid [1] - 664:12 lane [2] - 621:25, 818:5 language [2] - 731:13, 831:12 large [1] - 797:7 largely [2] - 717:24, 721:7 last [11] - 649:1, 721:6, 723:21, 738:1, 762:7, 784:1, 784:4, 787:22, 789:12, 796:18, 819:7 lasted [1] - 790:9 lastly [6] - 613:4, 684:11, 753:25, 760:5, 761:4, 821:16 latch [2] - 768:10, 778:19 latched [1] - 800:7 late [3] - 625:14, 835:4, 835:15 latter [1] - 831:5 laugh [1] - 668:14 law [107] - 609:9, 609:21, 610:6, 610:9, 611:18, 614:4, 616:7, 616:12, 619:11,</p>	<p>619:13, 620:8, 627:23, 628:1, 629:2, 629:23, 630:1, 630:20, 632:8, 632:12, 632:15, 632:19, 632:23, 632:25, 633:2, 633:10, 636:5, 637:8, 637:14, 644:13, 644:14, 646:15, 648:11, 648:12, 655:11, 659:13, 669:25, 670:3, 670:14, 684:2, 686:6, 687:1, 687:4, 691:18, 713:3, 716:16, 717:5, 717:19, 718:16, 720:14, 720:15, 721:24, 722:19, 722:20, 723:24, 724:3, 725:2, 725:6, 726:6, 726:15, 727:4, 727:5, 727:7, 727:16, 727:25, 728:2, 728:12, 736:7, 736:10, 739:22, 740:10, 740:11, 740:12, 740:15, 740:20, 740:23, 740:25, 741:1, 741:2, 741:9, 741:13, 741:15, 741:19, 741:23, 743:9, 748:2, 748:6, 748:11, 748:24, 748:25, 749:17, 751:14, 751:17, 757:4, 766:22, 771:19, 772:18, 778:5, 778:6, 779:21, 780:13, 788:15, 793:4, 796:12, 814:25, 817:19 Law [7] - 673:9, 673:19, 674:25, 675:21, 679:22, 712:18, 817:18 lawful [1] - 754:4 laws [1] - 778:25 lawsuit [3] - 742:9, 751:24, 786:17 lawyer [2] - 631:21, 640:15 lawyers [2] - 743:21, 832:7 laying [2] - 731:4, 766:9</p>	<p>lead [1] - 744:22 leading [5] - 720:24, 737:3, 767:25, 820:6, 820:23 leaning [2] - 803:4, 803:6 learn [1] - 636:20 learned [6] - 635:7, 657:18, 775:16, 800:14, 803:23, 813:21 least [11] - 624:18, 634:2, 662:3, 663:20, 682:10, 698:7, 706:18, 722:20, 731:24, 831:7, 831:8 leave [8] - 620:4, 732:21, 734:22, 782:11, 816:16, 816:17, 829:7 leaving [1] - 629:21 led [3] - 619:10, 720:10, 825:6 left [12] - 652:2, 664:10, 668:17, 680:15, 694:23, 695:6, 695:11, 776:7, 776:22, 777:4, 789:21, 810:7 legal [2] - 611:20, 619:16 Legal [1] - 607:15 legally [3] - 617:17, 618:14, 738:4 legislative [2] - 728:13, 728:22 legislature [1] - 728:16 legs [8] - 775:20, 805:7, 824:6, 824:7, 824:9, 824:15, 824:16, 824:19 length [2] - 708:3, 765:22 lengthy [2] - 729:15, 729:19 less [7] - 651:8, 651:17, 653:4, 725:5, 786:10, 786:13, 829:22 lethal [4] - 614:9, 614:13, 625:21, 778:9 level [3] - 614:14, 645:1, 736:11 leveled [1] - 790:21 Lewinski [1] - 634:15 LEXIS [1] - 612:17 liability [6] - 613:24,</p>	<p>618:7, 618:9, 757:12, 785:6, 823:9 liable [4] - 752:12, 764:5, 764:6, 780:10 lie [10] - 685:6, 693:13, 712:21, 746:3, 768:23, 769:17, 769:24, 781:22, 781:25, 782:3 lied [16] - 682:16, 683:16, 684:23, 693:7, 693:14, 709:10, 709:12, 768:22, 768:25, 769:7, 769:9, 769:10, 781:16, 808:2, 812:3, 812:12 lies [5] - 770:4, 781:13, 781:14, 808:3, 812:3 lieutenant [2] - 713:7, 802:1 Lieutenant [43] - 631:6, 642:20, 642:25, 643:3, 663:5, 675:10, 678:9, 678:16, 678:17, 693:4, 693:10, 699:4, 700:21, 701:4, 701:12, 701:16, 709:8, 709:11, 709:14, 768:11, 768:16, 768:20, 769:13, 769:18, 775:15, 798:2, 799:13, 799:24, 800:4, 800:12, 800:16, 800:19, 800:21, 801:22, 802:5, 805:25, 810:14, 812:4, 812:7, 815:25, 816:6, 825:3 life [32] - 614:2, 615:25, 616:4, 636:22, 704:13, 711:20, 731:5, 764:6, 765:2, 765:3, 770:19, 774:20, 778:3, 783:24, 784:2, 784:4, 784:15, 785:17, 785:19, 786:8, 786:9, 786:10, 786:12, 786:20, 788:12, 788:16, 788:19, 788:20, 788:23, 793:14, 825:17</p>

<p>light [16] - 610:13, 613:21, 617:20, 618:17, 620:25, 621:8, 713:11, 744:20, 747:3, 750:7, 794:18, 794:20, 814:23, 826:5, 828:7, 828:8</p> <p>lights [1] - 721:13</p> <p>likely [9] - 707:25, 756:7, 764:15, 777:15, 780:16, 780:18, 783:13, 804:24, 805:18</p> <p>likewise [3] - 618:11, 618:21, 743:20</p> <p>limine [1] - 620:17</p> <p>limit [1] - 707:24</p> <p>limitations [2] - 612:3, 728:2</p> <p>limited [7] - 671:4, 723:22, 724:10, 744:2, 744:15, 744:17, 749:21</p> <p>Lincoln [1] - 683:21</p> <p>line [53] - 624:20, 624:21, 644:12, 644:17, 644:21, 655:17, 674:6, 674:7, 681:2, 682:20, 682:22, 689:22, 696:1, 696:23, 696:24, 697:21, 699:16, 701:11, 702:21, 702:22, 715:4, 719:8, 719:17, 719:23, 722:13, 723:3, 724:20, 726:25, 729:17, 730:13, 730:15, 731:13, 732:14, 733:11, 733:14, 760:7, 760:12, 761:3, 761:4, 761:5, 764:9, 767:9, 769:2, 769:7, 771:6, 772:4, 772:5, 773:21, 780:23, 826:2</p> <p>lines [12] - 674:19, 719:20, 721:8, 725:20, 726:19, 726:20, 729:1, 733:19, 734:22, 760:7, 764:2, 824:2</p> <p>lip [1] - 794:17</p> <p>list [1] - 760:24</p> <p>listed [1] - 760:2</p> <p>listen [4] - 641:17, 793:24, 793:25,</p>	<p>825:8</p> <p>listened [1] - 815:4</p> <p>listening [4] - 729:20, 738:1, 740:5, 801:13</p> <p>literally [1] - 633:25</p> <p>literature [1] - 678:12</p> <p>litigated [1] - 727:25</p> <p>live [3] - 627:16, 654:17, 785:19</p> <p>lived [1] - 820:10</p> <p>lives [2] - 788:6, 791:5</p> <p>living [3] - 627:21, 786:1, 787:5</p> <p>LLP [1] - 607:18</p> <p>load [1] - 794:19</p> <p>local [1] - 829:7</p> <p>locate [1] - 648:24</p> <p>located [5] - 806:21, 806:23, 807:2, 807:3, 807:5</p> <p>location [7] - 657:7, 705:25, 780:2, 792:22, 810:7, 811:7, 811:8</p> <p>Lockman [1] - 635:8</p> <p>lodged [2] - 776:10, 776:15</p> <p>London [1] - 630:18</p> <p>look [46] - 621:14, 634:14, 653:1, 667:16, 683:23, 685:6, 696:1, 707:20, 715:5, 715:13, 719:7, 731:20, 765:20, 767:12, 771:9, 772:4, 772:5, 772:6, 772:25, 773:19, 773:23, 774:16, 775:9, 776:16, 777:19, 779:2, 779:4, 781:8, 783:6, 785:7, 791:4, 794:7, 794:9, 794:18, 817:21, 817:22, 817:24, 822:12, 822:13, 827:17, 828:25, 830:23</p> <p>looked [6] - 652:1, 721:6, 769:21, 772:22, 794:19, 803:6</p> <p>looking [15] - 617:3, 618:16, 623:9, 677:16, 705:5, 719:15, 724:19, 774:13, 780:15, 786:15, 793:9, 793:11, 803:3, 803:9, 826:13</p>	<p>looks [3] - 769:25, 770:2, 826:14</p> <p>loop [1] - 668:9</p> <p>lose [4] - 636:15, 636:16, 788:11</p> <p>loss [11] - 733:3, 734:15, 748:17, 749:11, 751:4, 751:9, 753:10, 760:5, 784:6, 785:10, 786:18</p> <p>losses [4] - 719:18, 752:23, 755:14, 756:1</p> <p>lost [3] - 654:10, 783:24, 825:23</p> <p>love [3] - 615:15, 705:6, 769:12</p> <p>Love [64] - 623:6, 623:8, 624:11, 624:15, 624:17, 625:2, 625:3, 642:19, 642:24, 654:9, 655:22, 657:11, 658:1, 664:9, 664:12, 668:20, 672:18, 676:13, 676:17, 677:25, 678:6, 693:7, 693:14, 704:18, 704:23, 708:24, 709:3, 709:10, 709:12, 764:20, 768:21, 768:22, 769:17, 769:19, 772:16, 775:18, 781:11, 791:16, 791:17, 798:18, 798:24, 799:12, 801:2, 806:14, 806:19, 806:23, 808:1, 808:2, 808:4, 808:20, 808:22, 809:2, 809:16, 809:19, 810:4, 810:6, 810:11, 810:13, 811:13, 812:8, 826:2, 826:3, 826:8, 826:11</p> <p>Love's [6] - 657:4, 668:18, 693:11, 769:4, 806:3, 810:3</p> <p>Loves' [2] - 802:9, 807:9</p> <p>lower [1] - 731:2</p> <p>luck [1] - 719:16</p> <p>lunch [4] - 681:13, 714:3, 714:8, 714:15</p> <p>luxury [1] - 645:3</p>	<p>lying [2] - 682:10, 768:21</p> <p style="text-align: center;">M</p> <p>ma'am [73] - 630:23, 631:18, 632:5, 632:9, 632:13, 633:5, 633:11, 633:14, 634:7, 634:10, 634:23, 635:1, 635:4, 636:4, 637:5, 639:25, 641:2, 641:9, 642:1, 642:6, 643:1, 643:7, 643:11, 643:16, 643:23, 644:3, 644:11, 648:15, 648:22, 650:7, 651:12, 652:6, 652:10, 652:25, 653:5, 653:10, 653:25, 654:6, 655:6, 655:9, 656:9, 658:17, 659:2, 659:15, 659:18, 659:22, 659:25, 660:4, 661:1, 661:7, 662:15, 662:21, 662:23, 663:21, 665:3, 669:12, 670:16, 671:22, 672:1, 673:10, 673:18, 673:20, 675:19, 678:21, 679:14, 679:19, 679:24, 712:10, 712:14, 712:19, 713:5, 713:15, 833:25</p> <p>mad [1] - 782:11</p> <p>Madam [10] - 627:4, 778:14, 791:12, 828:23, 829:5, 831:22, 833:8, 833:13, 833:24, 834:20</p> <p>magic [1] - 710:10</p> <p>magically [7] - 710:6, 710:8, 765:24, 766:2, 773:16, 777:13, 780:17</p> <p>maintain [2] - 752:4, 752:10</p> <p>majority [4] - 632:5, 823:2, 825:14</p> <p>malice [1] - 755:16</p> <p>man [7] - 680:21, 769:5, 781:23, 782:3, 785:1,</p>	<p>824:17, 824:18</p> <p>man's [2] - 765:3, 778:3</p> <p>maneuver [3] - 677:17, 677:18, 677:19</p> <p>manipulating [1] - 661:14</p> <p>Mannan [1] - 681:4</p> <p>manner [8] - 614:21, 672:4, 679:18, 699:25, 709:24, 745:4, 745:6, 746:3</p> <p>Mannington [2] - 657:12, 657:13</p> <p>manual [9] - 765:8, 765:9, 768:15, 773:3, 773:6, 800:12, 803:23, 803:24, 804:2</p> <p>Marc [1] - 665:15</p> <p>Marine [3] - 631:6, 631:9, 631:13</p> <p>Marines [1] - 631:7</p> <p>Marion [10] - 621:15, 702:6, 702:11, 778:7, 778:8, 794:25, 813:2, 813:6, 813:14, 822:8</p> <p>mark [3] - 674:5, 705:22, 824:23</p> <p>marking [1] - 636:24</p> <p>marks [5] - 696:13, 701:17, 701:18, 701:20, 775:5</p> <p>martial [1] - 652:12</p> <p>match [1] - 635:13</p> <p>matching [1] - 813:7</p> <p>material [3] - 640:3, 746:2, 747:14</p> <p>materials [2] - 642:15, 798:14</p> <p>math [2] - 782:9, 782:12</p> <p>mathematical [2] - 706:5, 758:5</p> <p>matter [21] - 609:5, 609:9, 610:6, 613:24, 619:5, 619:11, 620:1, 664:19, 692:6, 721:24, 736:7, 745:17, 746:2, 747:14, 772:23, 778:21, 808:12, 823:15, 823:16, 833:16, 835:25</p> <p>matters [2] - 746:17, 747:24</p> <p>mean [40] - 623:11,</p>
--	--	--	--	--

<p>625:25, 628:1, 640:18, 647:7, 650:21, 651:10, 658:8, 664:1, 664:3, 669:20, 669:22, 670:2, 686:24, 689:20, 690:8, 694:12, 695:19, 705:21, 706:21, 721:21, 722:8, 730:25, 733:18, 734:4, 767:2, 768:11, 768:24, 769:9, 770:8, 771:11, 771:25, 773:14, 776:17, 779:17, 781:22, 801:18, 807:4, 817:6, 828:2</p> <p>meaning [5] - 662:1, 669:20, 696:24, 742:8, 785:7</p> <p>meaningless [3] - 673:25, 674:1, 788:20</p> <p>means [8] - 639:14, 666:12, 674:12, 699:15, 699:18, 730:19, 756:14, 778:22</p> <p>meant [2] - 656:3, 674:14</p> <p>measure [2] - 689:4, 757:8</p> <p>measured [2] - 660:7, 660:18</p> <p>measurement [3] - 674:15, 793:12, 803:17</p> <p>measurements [2] - 661:5, 662:6</p> <p>measures [1] - 648:16</p> <p>Mechanicsburg [2] - 631:3, 713:6</p> <p>mechanism [1] - 727:6</p> <p>medical [9] - 730:17, 730:23, 731:21, 766:13, 775:19, 802:21, 802:24, 804:20, 820:14</p> <p>medically [1] - 676:25</p> <p>medium [1] - 650:21</p> <p>meeting [3] - 635:16, 635:17, 647:18</p> <p>Melissa [1] - 683:20</p> <p>member [2] - 615:9, 769:3</p> <p>members [8] - 621:10, 621:13, 622:11,</p>	<p>622:14, 625:21, 659:10, 754:3, 759:6</p> <p>Memorial [1] - 630:4</p> <p>memories [5] - 787:24, 788:5, 821:2, 821:5</p> <p>memory [7] - 636:17, 637:23, 678:13, 694:13, 747:19, 782:2, 811:10</p> <p>Memphis [5] - 647:19, 647:20, 647:22, 648:7, 649:12</p> <p>mental [10] - 731:3, 731:12, 733:9, 734:9, 753:11, 753:22, 753:23, 753:25, 760:3, 783:23</p> <p>mention [7] - 623:11, 685:3, 685:4, 802:10, 816:12, 817:15, 831:5</p> <p>mentioned [9] - 634:8, 710:14, 711:5, 743:3, 743:17, 746:16, 799:11, 816:19, 828:12</p> <p>mentions [1] - 623:1</p> <p>mere [7] - 689:1, 692:21, 744:16, 758:2, 758:24, 779:8, 779:13</p> <p>merely [4] - 688:13, 743:18, 747:4, 764:15</p> <p>mess [4] - 646:25, 704:15, 704:17</p> <p>message [3] - 761:15, 761:18, 827:11</p> <p>messed [2] - 827:14</p> <p>met [4] - 611:6, 624:12, 682:7, 818:24</p> <p>Michael [2] - 829:15, 833:23</p> <p>Michigan [1] - 628:14</p> <p>microphone [1] - 627:8</p> <p>middle [5] - 771:23, 775:6, 804:12, 811:19, 811:24</p> <p>might [17] - 625:13, 648:13, 648:14, 649:21, 654:3, 661:24, 681:11, 696:5, 707:18, 722:7, 722:10, 738:19, 745:7, 761:19, 782:19,</p>	<p>809:9, 819:18</p> <p>miles [11] - 660:24, 661:17, 661:18, 661:21, 665:10, 665:11, 665:12, 665:13, 666:9, 666:10</p> <p>military [1] - 668:4</p> <p>million [2] - 686:13, 763:22</p> <p>mind [10] - 673:24, 742:12, 745:4, 767:6, 797:13, 797:16, 797:21, 819:18, 821:22, 831:3</p> <p>minds [2] - 653:3, 742:19</p> <p>minimum [2] - 793:17, 801:15</p> <p>minor [2] - 654:14, 675:9</p> <p>minute [7] - 626:11, 690:12, 691:24, 737:3, 789:10, 789:18, 827:19</p> <p>minutes [21] - 614:25, 680:8, 680:14, 681:10, 681:13, 704:6, 706:18, 712:7, 714:5, 727:18, 735:14, 735:19, 735:21, 738:19, 739:16, 761:24, 762:14, 765:6, 781:4, 822:21, 835:5</p> <p>mirror [1] - 718:20</p> <p>mischaracterization [1] - 666:17</p> <p>misdemeanor [2] - 771:21</p> <p>miserably [1] - 650:23</p> <p>misleading [3] - 620:24, 621:13, 622:16</p> <p>misnomer [1] - 651:22</p> <p>misrecollection [1] - 745:14</p> <p>mistake [7] - 725:16, 770:25, 771:19, 779:24, 788:14, 788:18, 788:21</p> <p>mistrial [1] - 830:25</p> <p>misunderstood [1] - 725:23</p> <p>misuse [1] - 707:5</p> <p>modalities [1] - 634:1</p> <p>modality [1] - 633:18</p> <p>mode [3] - 650:20,</p>	<p>652:8, 829:10</p> <p>modern [1] - 641:13</p> <p>modification [1] - 723:7</p> <p>modified [6] - 716:10, 716:18, 716:20, 716:24, 717:8, 717:10</p> <p>moment [25] - 618:20, 678:24, 683:3, 692:19, 698:6, 699:22, 700:10, 700:15, 700:22, 701:22, 713:16, 724:15, 750:5, 767:19, 769:1, 771:17, 783:6, 783:7, 783:25, 784:4, 789:3, 826:4, 828:14, 833:5, 835:6</p> <p>moments [4] - 697:10, 729:23, 738:22, 789:24</p> <p>momentum [1] - 666:13</p> <p>Monday [6] - 794:10, 794:16, 817:23, 822:13, 830:2, 835:17</p> <p>Monell [1] - 617:9</p> <p>monetary [1] - 753:8</p> <p>money [7] - 686:20, 752:22, 753:8, 753:11, 758:8, 758:10, 785:18</p> <p>monitor [1] - 791:12</p> <p>month [1] - 631:2</p> <p>months [1] - 630:14</p> <p>Morgantown [5] - 607:16, 607:18, 607:19, 607:22, 607:23</p> <p>morning [21] - 609:2, 618:1, 618:6, 625:10, 625:15, 626:18, 626:21, 627:13, 636:7, 643:20, 679:11, 680:3, 680:7, 682:6, 722:4, 723:21, 794:10, 794:16, 817:23, 822:13, 830:2</p> <p>most [19] - 614:1, 614:6, 614:13, 616:3, 617:20, 618:17, 622:25, 623:11, 627:18, 627:22, 628:2, 762:25, 769:8,</p>	<p>769:9, 780:4, 780:5, 782:2, 794:18, 794:20</p> <p>mother [3] - 754:3, 785:20, 820:10</p> <p>motion [21] - 609:9, 609:12, 610:9, 613:13, 617:15, 618:12, 618:22, 618:24, 619:16, 639:6, 671:5, 715:21, 717:14, 723:16, 725:22, 725:24, 736:6, 737:22, 738:12, 773:11, 773:13</p> <p>MOTION [1] - 608:2</p> <p>motions [5] - 609:7, 619:20, 619:22, 620:17, 835:16</p> <p>motivated [8] - 609:22, 725:21, 726:18, 754:18, 755:5, 760:16, 784:10, 821:20</p> <p>motivation [1] - 750:10</p> <p>motive [18] - 609:22, 610:1, 610:5, 611:13, 614:2, 615:6, 618:3, 618:13, 725:21, 726:2, 726:3, 726:18, 732:17, 745:3, 754:18, 755:5, 760:16, 821:20</p> <p>mountain [3] - 708:7, 708:8, 708:11</p> <p>mountains [1] - 667:5</p> <p>mouth [8] - 664:21, 666:20, 666:21, 671:12, 792:14, 814:4, 823:24, 824:2</p> <p>move [24] - 624:24, 625:1, 637:12, 645:17, 652:2, 653:2, 672:3, 709:16, 731:2, 731:19, 766:15, 771:9, 775:20, 775:21, 786:6, 788:2, 796:21, 805:6, 805:12, 805:13, 806:13, 814:15</p> <p>moved [5] - 627:19, 628:25, 629:5, 630:8, 630:18</p> <p>movement [5] -</p>
---	--	---	--	--

<p>617:21, 618:17, 645:12, 691:8, 809:16</p> <p>movements [2] - 645:15, 675:14</p> <p>moves [1] - 613:7</p> <p>moving [50] - 609:12, 613:21, 638:4, 658:10, 660:19, 677:18, 689:16, 703:1, 703:5, 705:3, 705:10, 705:12, 705:13, 709:21, 710:6, 764:17, 764:22, 765:1, 765:19, 766:4, 770:14, 774:2, 775:10, 775:11, 779:9, 779:10, 779:13, 783:16, 783:18, 801:19, 804:19, 810:5, 810:12, 811:19, 811:24, 823:14, 823:15, 826:7, 826:8, 826:10, 826:12, 826:13, 826:14, 826:15, 826:19, 826:20, 826:22, 827:22</p> <p>MR [113] - 609:8, 609:11, 613:10, 613:12, 613:17, 613:20, 616:10, 616:23, 619:21, 619:23, 620:9, 620:15, 622:6, 622:22, 622:25, 623:5, 623:14, 625:8, 625:17, 626:4, 626:9, 637:17, 637:21, 638:24, 639:3, 639:5, 639:8, 680:5, 681:10, 681:17, 682:3, 682:5, 682:22, 682:23, 685:9, 685:13, 685:14, 690:3, 690:6, 690:7, 712:1, 713:22, 714:23, 715:20, 719:2, 719:4, 719:13, 719:15, 720:1, 720:3, 721:4, 721:9, 722:1, 722:5, 723:9, 723:12, 724:14, 724:17, 724:22, 725:16, 726:17, 726:23, 727:14, 727:23, 729:4,</p>	<p>729:8, 729:10, 729:12, 730:3, 730:6, 730:12, 730:15, 730:23, 731:11, 732:10, 732:25, 733:2, 733:23, 734:10, 734:13, 734:18, 734:25, 735:2, 735:14, 736:1, 736:5, 738:15, 738:17, 739:3, 762:21, 763:6, 763:13, 786:7, 786:22, 786:25, 787:2, 787:20, 787:23, 788:3, 796:21, 798:9, 810:21, 811:1, 822:20, 822:22, 827:20, 829:3, 830:4, 830:9, 830:15, 831:14, 832:12, 835:20</p> <p>MS [53] - 620:11, 621:21, 623:18, 623:21, 624:7, 624:22, 625:11, 626:6, 627:1, 627:10, 627:12, 637:12, 639:18, 639:19, 649:23, 650:3, 678:24, 679:2, 679:25, 681:19, 685:10, 689:21, 689:24, 712:3, 712:6, 713:16, 713:18, 713:24, 714:21, 728:7, 733:13, 733:21, 734:21, 735:18, 739:5, 739:8, 762:23, 763:7, 786:5, 786:21, 787:17, 790:6, 792:7, 796:25, 798:11, 798:15, 811:2, 829:4, 830:17, 831:7, 832:1, 832:13, 835:22</p> <p>MSU [1] - 662:8</p> <p>muddy [3] - 662:20, 663:11, 663:19</p> <p>multiple [5] - 645:4, 646:23, 646:25, 691:5, 691:15</p> <p>Mundell [2] - 813:8, 813:9</p> <p>must [45] - 609:22,</p>	<p>610:7, 610:13, 644:25, 646:3, 668:3, 668:7, 691:4, 724:25, 725:4, 740:14, 740:15, 740:18, 740:19, 741:14, 741:21, 744:3, 744:10, 744:13, 748:18, 748:22, 749:12, 750:1, 750:19, 750:22, 752:1, 752:2, 752:7, 752:12, 752:14, 754:13, 755:3, 755:24, 756:18, 756:25, 758:11, 758:13, 758:17, 760:10, 763:16, 763:25, 764:13, 765:9, 799:9, 800:2</p> <p>mutes [1] - 831:21</p>	<p>N</p> <p>name [2] - 682:6, 723:3</p> <p>Nathan [1] - 607:21</p> <p>nation [2] - 636:14, 648:4</p> <p>nation's [1] - 782:2</p> <p>national [1] - 659:13</p> <p>National [7] - 673:9, 673:19, 674:25, 675:21, 679:22, 712:18, 817:18</p> <p>nationally [1] - 644:15</p> <p>naturally [1] - 655:19</p> <p>nature [2] - 617:5, 753:19</p> <p>near [5] - 621:20, 622:1, 622:11, 664:6, 813:6</p> <p>nearby [1] - 737:3</p> <p>nearly [4] - 614:23, 774:12, 789:2, 824:2</p> <p>necessarily [4] - 728:2, 730:25, 746:10, 757:14</p> <p>necessary [6] - 645:2, 690:5, 750:15, 755:25, 758:13, 778:10</p> <p>neck [3] - 647:12, 766:16, 775:22</p> <p>need [28] - 619:20, 625:9, 625:17, 632:22, 635:14, 635:18, 640:11, 642:13, 646:21,</p>	<p>650:10, 666:15, 681:15, 705:22, 708:18, 725:8, 730:1, 735:25, 738:13, 739:1, 759:5, 762:19, 763:4, 768:23, 781:8, 798:13, 823:4, 832:10, 835:19</p> <p>needed [4] - 642:13, 647:1, 661:15, 801:10</p> <p>needs [3] - 724:3, 727:6, 831:25</p> <p>negative [3] - 646:14, 785:21, 813:11</p> <p>Negative [1] - 813:9</p> <p>negatively [1] - 791:10</p> <p>neglect [2] - 752:2, 752:8</p> <p>negligence [1] - 611:14</p> <p>neutral [43] - 614:23, 615:2, 615:18, 616:1, 617:4, 657:23, 688:9, 688:12, 688:15, 688:20, 688:21, 688:25, 710:9, 710:12, 710:13, 764:18, 765:9, 765:12, 765:17, 766:8, 766:12, 766:19, 773:2, 773:9, 773:13, 775:12, 775:13, 775:14, 775:17, 775:23, 780:18, 780:24, 785:1, 800:7, 800:10, 800:14, 800:18, 803:20, 803:22, 804:8, 823:11, 824:8, 824:10</p> <p>Never [1] - 635:7</p> <p>never [21] - 645:4, 649:15, 649:16, 654:17, 683:11, 763:16, 764:3, 768:24, 788:5, 807:1, 807:3, 809:16, 809:21, 812:5, 812:9, 812:13, 818:2, 819:23, 820:22, 829:17</p> <p>new [1] - 818:3</p> <p>New [1] - 627:17</p> <p>news [1] - 796:18</p>	<p>newspapers [1] - 648:1</p> <p>next [11] - 631:11, 653:16, 724:17, 725:18, 730:12, 732:13, 739:18, 786:7, 796:14, 826:5, 826:6</p> <p>night [2] - 649:1, 723:21</p> <p>nightmare [1] - 788:10</p> <p>nine [7] - 660:5, 660:6, 717:22, 721:8, 733:20, 788:4, 788:9</p> <p>NO [9] - 607:4, 834:4, 834:6, 834:8, 834:10, 834:12, 834:14, 834:16, 834:18</p> <p>nobody [13] - 651:15, 661:23, 662:9, 662:11, 663:5, 664:11, 668:14, 707:12, 765:10, 803:19, 826:9, 827:2</p> <p>nominal [15] - 716:21, 724:18, 725:1, 725:4, 725:14, 732:7, 732:12, 754:7, 754:10, 754:14, 756:2, 760:11, 760:12, 784:10</p> <p>non [5] - 613:21, 617:21, 618:17, 639:15, 743:9</p> <p>non-existence [1] - 743:9</p> <p>non-expert [1] - 639:15</p> <p>non-movement [2] - 617:21, 618:17</p> <p>non-moving [1] - 613:21</p> <p>none [8] - 616:7, 632:13, 663:1, 663:25, 676:19, 764:17, 775:10, 777:17</p> <p>norm [1] - 666:3</p> <p>normal [2] - 691:2, 710:10</p> <p>normally [2] - 639:15, 651:3</p> <p>North [1] - 813:6</p> <p>Northern [5] - 612:14, 612:18, 616:10, 836:5, 836:15</p> <p>NORTHERN [1] - 607:2</p>
---	---	---	--	--	---

<p>note [14] - 615:5, 623:24, 624:8, 625:12, 715:20, 732:6, 761:16, 807:12, 829:13, 829:21, 830:17, 831:10, 831:23, 832:20</p> <p>noted [9] - 612:23, 619:18, 709:3, 723:6, 724:13, 729:22, 738:8, 738:13, 807:11</p> <p>notes [4] - 747:18, 747:19, 747:21, 747:23</p> <p>nothing [26] - 610:2, 615:17, 619:21, 626:9, 675:12, 691:12, 719:2, 723:9, 729:4, 729:8, 729:12, 730:3, 730:20, 732:25, 734:4, 734:25, 738:15, 738:17, 770:11, 781:3, 782:22, 788:20, 799:4, 799:7, 823:8, 832:12</p> <p>nowhere [3] - 684:14, 773:21, 773:22</p> <p>nuclear [1] - 786:11</p> <p>number [40] - 612:16, 614:16, 620:16, 623:22, 631:22, 631:23, 632:10, 632:25, 647:4, 654:1, 657:10, 685:1, 685:19, 687:9, 689:9, 712:8, 712:24, 716:6, 716:8, 716:10, 716:15, 716:17, 716:19, 717:9, 721:4, 721:7, 742:23, 746:10, 820:3, 829:8, 833:17, 834:1, 834:3, 834:5, 834:7, 834:9, 834:11, 834:13, 834:15, 834:17</p> <p>numbered [1] - 719:9</p> <p>numbers [4] - 660:22, 681:3, 715:4, 729:17</p> <p>numerically [1] - 761:20</p> <p>numerous [1] - 673:22</p>	<p style="text-align: center;">O</p> <p>oath [8] - 682:1, 682:16, 693:8, 702:10, 709:12, 769:8, 781:14, 801:3</p> <p>object [5] - 689:21, 690:4, 723:13, 798:9, 810:21</p> <p>objection [36] - 637:15, 639:3, 639:10, 690:2, 720:2, 722:12, 723:6, 723:7, 724:13, 725:15, 726:5, 726:13, 726:20, 727:19, 727:20, 729:2, 730:7, 732:5, 732:6, 733:11, 733:13, 733:19, 734:19, 738:12, 743:22, 743:24, 743:25, 744:9, 786:5, 786:21, 787:17, 796:21, 830:12, 830:15, 830:19, 830:20</p> <p>objections [5] - 619:18, 639:6, 715:11, 732:20, 743:20</p> <p>objective [21] - 610:16, 611:1, 644:23, 646:7, 676:7, 702:23, 702:24, 706:1, 706:11, 706:15, 706:17, 706:19, 748:19, 750:6, 777:20, 813:20, 817:5, 817:6, 817:20, 825:7</p> <p>objectively [28] - 611:3, 675:24, 676:1, 676:10, 682:14, 685:20, 686:14, 702:7, 702:12, 702:15, 702:18, 702:19, 703:3, 750:7, 750:11, 759:17, 770:18, 783:15, 783:18, 814:22, 817:9, 818:8, 818:15, 818:17, 818:19, 819:1, 822:10, 833:21</p> <p>objects [1] - 638:4</p> <p>obligation [2] -</p>	<p>743:21, 819:22</p> <p>observe [2] - 641:17, 668:6</p> <p>observed [1] - 671:19</p> <p>observing [1] - 679:16</p> <p>obstacle [1] - 669:5</p> <p>obtain [1] - 641:6</p> <p>obviously [5] - 631:16, 632:6, 672:8, 718:15, 728:25</p> <p>occasions [1] - 693:14</p> <p>occur [1] - 756:7</p> <p>occurred [18] - 611:4, 614:20, 617:12, 619:12, 647:19, 678:20, 698:5, 707:25, 720:10, 731:2, 736:19, 736:23, 754:12, 756:9, 801:17, 812:6, 812:14</p> <p>occurring [2] - 792:3, 811:12</p> <p>occurs [1] - 731:17</p> <p>odds [1] - 762:7</p> <p>OF [1] - 607:2</p> <p>offend [2] - 646:18, 735:23</p> <p>offended [1] - 707:4</p> <p>offensive [5] - 668:24, 669:6, 670:2, 686:15, 791:6</p> <p>offensiveness [1] - 756:11</p> <p>offer [4] - 630:12, 700:9, 702:17, 702:19</p> <p>offered [3] - 615:2, 658:25, 743:22</p> <p>Office [5] - 627:25, 630:3, 630:17, 631:23, 644:19</p> <p>office [4] - 628:3, 628:5, 738:21, 829:7</p> <p>OFFICER [1] - 831:19</p> <p>Officer [3] - 628:4, 628:6, 644:20</p> <p>officer [75] - 624:8, 624:19, 627:23, 628:11, 629:23, 630:2, 630:15, 630:21, 632:8, 636:6, 644:16, 645:4, 645:11, 646:15, 648:13, 648:17, 648:18, 648:20, 651:20, 652:3, 652:4,</p>	<p>652:11, 652:22, 652:23, 652:24, 653:2, 655:22, 657:12, 666:20, 667:17, 669:4, 672:23, 677:9, 682:25, 684:2, 686:13, 689:8, 689:16, 689:18, 691:14, 696:20, 707:20, 713:7, 720:8, 720:22, 721:2, 722:5, 722:8, 736:9, 736:13, 748:20, 749:14, 749:18, 749:23, 750:2, 750:14, 750:16, 750:18, 750:19, 759:22, 760:22, 761:16, 764:2, 791:20, 793:8, 794:4, 794:10, 794:18, 794:21, 796:19, 814:25, 825:9, 825:13, 827:9</p> <p>officer's [9] - 610:12, 610:15, 648:19, 651:15, 652:7, 720:8, 750:7, 796:11, 796:12</p> <p>officers [42] - 611:14, 629:10, 629:17, 629:19, 630:15, 632:12, 636:18, 644:21, 644:25, 645:3, 645:9, 646:6, 646:17, 647:16, 647:21, 647:22, 650:24, 651:4, 655:20, 670:5, 670:15, 671:14, 674:9, 675:6, 677:4, 684:9, 684:19, 687:4, 687:11, 704:10, 713:3, 751:14, 751:17, 763:16, 764:3, 796:25, 799:19, 816:22, 825:11, 825:15, 825:22, 825:23</p> <p>Officers [1] - 628:3</p> <p>officers' [1] - 651:5</p> <p>offices [1] - 754:2</p> <p>Official [3] - 666:3, 836:4, 836:15</p> <p>official [1] - 607:9</p> <p>often [2] - 636:22, 756:12</p>	<p>oftentimes [2] - 647:11, 676:24</p> <p>Ohio [20] - 627:17, 627:22, 627:24, 628:3, 628:4, 628:6, 628:12, 630:8, 630:10, 630:11, 630:17, 630:18, 631:23, 634:3, 644:19, 645:24, 646:10, 646:22, 646:25, 683:20</p> <p>Okeechobee [1] - 654:18</p> <p>old [6] - 765:25, 771:18, 782:19, 787:10, 788:18, 788:20</p> <p>once [10] - 636:25, 684:5, 739:18, 758:10, 786:16, 816:11, 816:12, 816:14, 824:11</p> <p>oncoming [4] - 621:24, 621:25, 624:3, 818:4</p> <p>one [106] - 623:22, 625:18, 630:25, 633:12, 635:11, 635:20, 636:8, 639:20, 644:4, 649:3, 654:1, 658:5, 661:18, 664:11, 665:7, 665:10, 665:12, 665:15, 666:13, 666:23, 669:7, 673:20, 673:22, 678:24, 680:20, 685:24, 696:21, 698:3, 699:21, 709:11, 713:16, 716:1, 716:6, 716:8, 717:2, 717:3, 717:8, 721:6, 722:1, 724:14, 726:23, 726:24, 731:2, 740:14, 743:6, 750:6, 755:9, 756:6, 758:14, 759:6, 759:14, 759:19, 759:20, 763:25, 764:12, 765:7, 765:22, 766:5, 766:6, 769:10, 772:24, 776:24, 780:24, 781:4, 781:18, 782:1, 784:20, 787:6, 788:19, 789:3, 792:7,</p>
--	---	--	--	--

<p>792:10, 793:20, 797:2, 804:11, 806:23, 806:25, 807:19, 811:7, 812:7, 812:15, 812:20, 815:13, 815:21, 817:14, 824:18, 824:19, 824:23, 825:25, 827:14, 827:17, 827:18, 827:19, 828:6, 828:17, 829:15, 829:17, 829:24, 830:14, 833:17, 834:3 one's [2] - 669:19, 731:2 one-third [1] - 630:25 ones [3] - 635:25, 825:24 online [3] - 647:9, 648:9, 648:21 OODA [2] - 668:5, 668:9 open [22] - 609:1, 626:17, 650:17, 680:16, 681:24, 714:17, 739:11, 762:17, 763:10, 764:11, 789:22, 790:2, 792:6, 792:9, 793:19, 793:23, 814:16, 828:21, 830:2, 831:3, 832:17, 835:10 open-ended [1] - 650:17 opened [1] - 703:1 opening [21] - 663:20, 663:23, 698:14, 797:7, 797:11, 797:14, 797:21, 797:24, 798:4, 798:25, 799:1, 799:8, 799:11, 799:14, 808:2, 812:2, 812:22, 814:4, 820:1, 820:21, 821:22 operate [1] - 661:11 operates [1] - 765:9 operation [2] - 676:21, 710:10 Operational [7] - 673:9, 673:19, 675:1, 675:22, 679:22, 712:18, 817:18 operational [2] - 659:14, 676:9</p>	<p>operator [1] - 709:19 opines [1] - 667:3 opinion [50] - 610:21, 611:8, 612:15, 620:17, 623:6, 623:22, 625:18, 635:23, 639:2, 640:15, 642:14, 642:15, 648:17, 653:21, 654:1, 654:5, 655:1, 655:3, 655:8, 658:11, 658:16, 659:4, 659:5, 659:9, 659:14, 659:16, 659:24, 668:21, 673:14, 675:18, 675:20, 675:22, 685:15, 687:7, 687:25, 693:19, 702:17, 702:20, 709:25, 741:2, 741:16, 743:16, 746:17, 758:21, 758:24, 766:25, 772:15, 810:11 opinions [35] - 619:25, 620:16, 639:15, 639:23, 641:1, 641:7, 643:19, 644:2, 650:22, 653:7, 653:9, 653:17, 653:18, 653:19, 653:20, 653:24, 654:2, 658:25, 662:25, 673:3, 673:4, 673:13, 675:15, 679:10, 679:12, 679:18, 712:12, 713:9, 713:10, 713:12, 737:9, 738:2, 746:23, 816:16 OPOTA [1] - 684:7 opportunity [11] - 641:5, 641:24, 643:8, 643:10, 659:19, 762:1, 762:3, 790:22, 801:7, 816:7, 819:24 opposed [4] - 724:7, 728:10, 729:20, 740:5 opposing [4] - 614:15, 802:10, 818:5, 819:8 opposite [1] - 699:19 option [3] - 729:21, 829:24, 830:1 order [10] - 618:6,</p>	<p>643:14, 656:15, 740:20, 751:25, 758:12, 815:2, 828:12, 835:14, 835:17 ordered [2] - 643:13, 744:10 ordinarily [1] - 746:25 ordinary [1] - 742:9 organs [2] - 805:10, 805:12 orient [1] - 668:6 original [1] - 653:21 originally [1] - 650:16 otherwise [4] - 680:8, 761:20, 765:11, 829:9 outlined [1] - 650:17 outrageous [4] - 611:22, 616:4, 619:7, 755:17 outside [2] - 744:12, 789:15 Outstanding [1] - 625:16 outstanding [2] - 681:21, 740:7 outweigh [1] - 742:18 outweighs [1] - 742:13 overhead [2] - 693:10, 694:13 overly [2] - 651:2, 726:10 overrule [2] - 722:11, 725:10 overruled [10] - 723:6, 725:15, 726:5, 726:13, 729:2, 732:5, 744:1, 787:1, 787:21, 798:13 overseas [1] - 631:11 owe [1] - 819:22 own [21] - 614:10, 622:12, 631:23, 632:1, 633:21, 641:16, 645:8, 747:6, 747:25, 758:21, 764:3, 764:22, 777:20, 780:14, 783:1, 783:19, 786:19, 788:22, 795:20, 799:3, 823:12</p>	<p>page [16] - 623:5, 625:7, 681:5, 682:22, 719:16, 719:20, 721:8, 724:19, 725:20, 726:19, 726:25, 730:13, 733:20, 734:23, 764:12 pages [2] - 715:6, 816:11 paid [5] - 683:5, 686:12, 686:15, 772:17, 794:17 pain [12] - 718:13, 730:15, 730:19, 731:4, 752:25, 753:3, 753:5, 753:6, 753:17, 760:4, 783:25, 805:14 pan [1] - 787:15 paper [3] - 635:23, 642:14, 642:16 papers [1] - 640:4 paragraph [1] - 732:14 parallel [1] - 655:12 paralysis [1] - 731:19 paralyzed [7] - 731:24, 804:21, 805:4, 805:6, 805:12, 805:17, 805:20 parent [2] - 786:12, 820:14 parent's [2] - 786:12, 788:10 parents [2] - 786:9, 787:4 park [7] - 668:10, 668:16, 776:1, 780:3, 780:21, 814:15, 827:4 Parkersburg [2] - 649:13, 649:14 parking [1] - 699:16 part [26] - 610:3, 638:15, 666:16, 677:1, 677:9, 707:13, 717:10, 718:2, 718:6, 721:19, 722:16, 722:23, 723:3, 741:3, 751:19, 752:9, 753:1, 757:13, 785:8, 800:18, 803:18, 805:19, 806:5, 809:25, 819:7, 822:8 partial [1] - 731:25 participants [2] - 647:4, 647:7 participate [1] -</p>	<p>813:13 particular [8] - 653:24, 689:22, 722:13, 724:12, 738:2, 742:3, 750:1, 757:19 particularly [7] - 616:24, 647:22, 722:20, 725:2, 725:20, 728:17, 834:23 particulars [2] - 746:6, 747:15 parties [9] - 716:10, 716:24, 717:8, 719:8, 739:19, 741:17, 744:8, 748:10, 820:2 parties' [2] - 715:9, 716:15 partisans [1] - 759:1 partner [7] - 658:2, 669:2, 669:3, 669:5, 672:17, 672:19, 737:1 parts [4] - 671:2, 718:9, 718:10, 800:19 party [7] - 613:21, 741:15, 747:8, 752:4, 755:10, 755:14, 758:6 pass [2] - 703:18, 761:15 passed [5] - 612:19, 615:4, 622:7, 625:19, 813:8 passenger's [3] - 624:24, 677:14, 806:15 passing [2] - 619:4, 767:20 passion [1] - 756:25 past [7] - 637:8, 663:19, 703:25, 727:18, 756:13, 818:22, 821:12 path [8] - 621:20, 776:6, 802:23, 802:25, 803:2, 813:24, 813:25, 814:21 paths [1] - 655:13 patrol [3] - 630:3, 684:5, 684:22 pattern [5] - 635:21, 640:13, 691:13, 709:19, 815:22 pause [1] - 627:4 pay [2] - 758:9, 833:12 Peace [4] - 628:2,</p>
---	---	---	--	---

P

p.m [7] - 763:3,
789:25, 829:11,
836:1

<p>628:4, 628:6, 644:19 peace [1] - 630:15 PEDA [1] - 668:2 pendency [1] - 682:17 Pennsylvania [1] - 628:14 people [15] - 631:8, 638:17, 645:23, 647:9, 650:16, 651:8, 651:17, 655:15, 670:11, 673:22, 687:10, 704:16, 771:22, 793:6, 806:4 people's [1] - 650:22 per [3] - 665:13, 665:14, 689:19 perceive [1] - 668:3 perceived [9] - 621:17, 622:13, 622:18, 625:23, 658:21, 753:5, 778:16, 778:17, 778:21 percent [14] - 666:4, 666:5, 685:18, 685:25, 686:25, 772:18, 772:19, 786:3, 796:13, 805:3, 805:17, 808:10, 819:16 perception [2] - 672:23, 672:25 perceptions [1] - 610:15 Perdue [1] - 635:9 perform [1] - 741:14 performance [4] - 634:14, 634:18, 816:9, 816:12 perhaps [1] - 726:12 period [5] - 664:5, 762:4, 795:12, 798:21, 809:16 peripheral [1] - 677:12 permanent [1] - 753:20 permit [1] - 741:15 permitted [9] - 611:19, 614:9, 639:14, 736:14, 744:18, 757:21, 764:1, 778:9, 778:24 perpendicular [4] - 699:8, 775:5, 823:24, 824:1 Perry [1] - 736:13 person [37] - 610:11, 614:24, 628:20, 645:10, 645:13,</p>	<p>645:14, 648:15, 648:17, 648:18, 669:20, 691:4, 711:7, 711:16, 751:3, 751:8, 751:16, 751:18, 752:1, 754:8, 765:4, 783:24, 793:15, 802:24, 803:8, 810:18, 810:19, 811:3, 811:5, 811:7, 811:8, 811:9, 811:10, 811:12, 833:1 Personal [1] - 607:5 personal [10] - 612:2, 612:24, 626:11, 633:22, 661:20, 741:2, 748:4, 789:10, 789:16, 797:18 persons [3] - 741:22, 741:23, 745:13 perspective [9] - 667:17, 723:8, 728:4, 730:2, 739:21, 750:2, 811:21, 811:23, 831:7 persuasive [3] - 742:13, 742:18, 742:25 pertains [1] - 745:17 pertinent [1] - 748:2 Petry [1] - 629:1 Ph.D [2] - 634:15, 665:16 phase [1] - 739:18 Philip [97] - 607:5, 610:18, 612:12, 612:13, 688:16, 703:2, 711:9, 711:11, 711:12, 711:16, 719:18, 719:23, 720:18, 721:12, 721:14, 722:14, 722:16, 724:24, 733:4, 734:16, 736:21, 740:22, 748:5, 748:6, 748:13, 748:15, 748:17, 748:22, 749:1, 749:4, 749:6, 749:9, 749:11, 749:22, 749:23, 749:25, 750:21, 750:23, 751:5, 751:6, 751:10, 751:13, 751:19, 751:23,</p>	<p>752:6, 752:7, 752:10, 752:14, 752:18, 752:19, 752:20, 752:23, 752:24, 753:1, 753:2, 753:5, 753:14, 753:15, 753:16, 753:21, 753:23, 754:2, 754:5, 754:6, 755:7, 755:16, 756:1, 759:16, 760:4, 760:6, 760:18, 763:14, 766:9, 766:14, 770:15, 770:22, 771:1, 775:19, 777:25, 780:8, 783:14, 784:1, 784:8, 784:13, 784:17, 785:15, 789:6, 797:4, 797:19, 818:14, 820:5, 821:4, 821:24, 827:6, 833:20 Philip's [4] - 730:16, 770:18, 777:23, 788:23 phone [3] - 640:9, 788:7, 829:8 phonetic [2] - 610:11, 713:1 phonetic [4] - 635:9, 683:21, 736:13, 736:16 photo [15] - 698:25, 699:5, 699:12, 700:9, 700:21, 701:19, 768:8, 768:17, 770:8, 772:2, 774:21, 774:24, 776:8, 823:19, 823:21 photograph [5] - 662:20, 662:24, 700:14, 815:20, 816:7 photographs [7] - 643:5, 781:7, 801:12, 807:22, 807:23, 814:3 photos [7] - 664:3, 664:4, 695:14, 704:5, 807:13, 807:15, 807:16 phrase [3] - 742:7, 816:8, 817:9 phrased [1] - 619:25 physical [32] - 667:22, 667:23, 687:14,</p>	<p>687:17, 687:22, 688:4, 689:4, 689:13, 690:11, 690:17, 692:7, 692:9, 692:18, 702:2, 706:17, 706:19, 706:22, 737:11, 750:18, 750:25, 753:11, 753:16, 753:17, 767:4, 767:7, 767:24, 772:13, 772:23, 773:1, 775:7, 777:20, 823:1 physiological [1] - 798:20 pick [3] - 630:7, 666:8, 788:7 pickup [1] - 669:23 pictorial [2] - 650:20, 650:24 picture [5] - 663:8, 698:21, 768:6, 802:11, 825:2 pictures [10] - 657:16, 657:22, 660:4, 674:16, 689:5, 765:19, 765:20, 767:25, 773:20, 806:16 piece [11] - 615:1, 700:25, 764:17, 777:17, 777:18, 780:25, 822:25, 823:1, 823:5, 823:17, 827:17 pieces [1] - 734:7 pilots [2] - 668:5 pin [1] - 620:3 pipng [1] - 674:17 Pipkins [1] - 647:13 pistol [1] - 616:3 place [24] - 636:20, 645:20, 657:20, 662:24, 664:8, 664:13, 667:24, 667:25, 674:3, 674:4, 678:22, 678:23, 696:12, 696:17, 697:15, 698:11, 706:24, 707:1, 708:3, 710:13, 730:7, 781:18, 805:23 placed [5] - 620:18, 654:3, 655:4, 658:12, 658:19 placement [1] - 664:20 placing [4] - 621:10,</p>	<p>621:13, 622:14, 659:10 Plaintiff [2] - 607:7, 607:15 plaintiff [53] - 609:6, 610:20, 612:8, 612:9, 613:1, 614:7, 614:14, 616:25, 617:23, 618:18, 619:22, 626:21, 714:22, 719:17, 719:21, 719:25, 721:21, 738:5, 741:25, 742:5, 742:9, 742:16, 748:3, 748:13, 749:6, 751:3, 751:8, 753:13, 754:15, 754:21, 755:19, 755:25, 757:9, 757:11, 757:14, 757:15, 757:19, 758:4, 759:14, 759:24, 760:10, 760:14, 762:1, 762:3, 764:13, 783:11, 790:11, 797:15, 800:16, 803:18, 818:12, 818:16, 833:18 plaintiffs [34] - 609:15, 610:17, 611:7, 617:17, 624:9, 716:4, 716:8, 716:9, 716:14, 716:16, 716:18, 716:22, 717:2, 718:20, 723:8, 730:1, 737:9, 737:10, 742:12, 742:15, 742:17, 757:17, 790:13, 791:3, 797:8, 797:23, 797:24, 798:3, 799:13, 800:21, 802:4, 804:20, 808:14, 812:22 plaintiffs [6] - 729:8, 730:3, 731:12, 755:3, 800:6, 807:24 plan [2] - 735:5, 769:11 planning [1] - 739:21 play [5] - 643:10, 681:12, 792:4, 792:7, 793:22 played [2] - 808:5, 809:4 playing [3] - 792:6,</p>
---	--	---	--	---

<p>793:19, 793:23 Playing [1] - 792:9 pleadings [1] - 614:5 pleasant [1] - 714:15 pleased [1] - 835:3 pleasure [1] - 790:19 Pledge [1] - 795:18 plenty [2] - 618:5, 731:7 PLLC [2] - 607:15, 607:22 Poe [1] - 607:22 poignant [1] - 788:25 point [87] - 609:7, 609:9, 610:25, 611:7, 614:22, 616:23, 617:7, 618:18, 619:20, 620:5, 620:8, 641:1, 641:19, 650:11, 654:14, 655:22, 657:6, 662:13, 665:7, 666:9, 668:1, 674:7, 674:20, 678:21, 679:25, 680:7, 680:10, 680:23, 695:9, 699:13, 699:15, 699:17, 707:2, 710:21, 715:9, 717:6, 718:1, 718:25, 722:25, 726:16, 729:2, 731:14, 731:15, 734:5, 735:25, 738:12, 738:13, 739:2, 761:23, 768:4, 770:23, 771:16, 784:9, 787:1, 787:22, 787:23, 789:11, 789:13, 791:11, 792:13, 794:6, 796:4, 797:19, 799:3, 799:10, 802:16, 802:17, 803:16, 804:11, 805:8, 806:7, 806:16, 810:5, 810:12, 814:7, 821:5, 821:10, 821:24, 828:15, 829:19, 829:20, 830:6, 830:12, 831:4, 831:22, 831:23, 835:19 pointed [1] - 614:16 pointing [2] - 701:19, 743:8 points [4] - 613:22,</p>	<p>614:18, 617:19, 770:11 pole [1] - 787:9 police [42] - 628:11, 631:3, 638:10, 638:25, 639:2, 645:11, 647:20, 652:4, 674:13, 675:10, 685:18, 687:11, 691:5, 704:8, 720:7, 720:22, 721:1, 736:11, 737:17, 763:16, 764:2, 764:3, 769:3, 793:5, 793:8, 794:4, 794:10, 794:18, 794:21, 796:11, 796:19, 796:25, 799:19, 800:2, 816:21, 825:9, 825:11, 825:13, 825:15, 825:22, 825:23, 827:9 Police [10] - 628:13, 628:14, 628:19, 629:15, 630:9, 643:2, 647:20, 676:22, 793:7, 808:16 police-related [1] - 685:18 policies [10] - 614:12, 692:19, 702:21, 737:16, 764:4, 778:6, 783:1, 783:19, 788:23, 825:25 Policies [1] - 679:23 policing [5] - 763:15, 778:1, 780:5, 783:2, 827:12 policy [23] - 614:10, 621:16, 622:16, 625:21, 626:2, 643:21, 643:22, 649:7, 702:6, 702:12, 703:6, 764:4, 778:7, 778:15, 779:5, 779:19, 780:14, 780:22, 784:15, 812:18, 812:20, 823:12, 827:13 poll [1] - 833:24 polled [1] - 832:8 pollen [1] - 662:1 polls [1] - 833:13 poor [2] - 668:19, 728:13</p>	<p>poorly [1] - 791:5 popped [1] - 803:7 population [2] - 666:5, 666:6 Port [5] - 682:24, 683:25, 684:3, 712:20 Portage [1] - 630:2 portion [3] - 622:21, 722:12, 725:19 portions [7] - 693:11, 716:17, 716:23, 717:7, 717:9, 718:20, 831:2 portrayed [1] - 662:3 posed [3] - 749:22, 750:24, 833:7 poses [1] - 750:17 position [12] - 610:12, 683:4, 691:7, 691:9, 691:15, 776:6, 776:17, 803:14, 803:15, 810:20, 811:5, 832:7 positioned [2] - 795:4, 803:10 positions [2] - 678:19, 806:6 possibilities [3] - 690:21, 691:22, 707:23 possibility [2] - 682:10, 727:15 possible [9] - 666:18, 669:15, 672:14, 696:1, 758:6, 761:17, 796:20, 824:8, 831:5 possibly [6] - 655:16, 657:14, 728:11, 765:21, 766:7, 768:8 post [2] - 738:20, 835:16 POST [1] - 628:2 posture [1] - 691:9 potential [3] - 671:3, 819:20, 830:25 potentially [4] - 618:15, 670:22, 671:6, 791:16 pound [2] - 711:14, 794:5 pounds [1] - 652:15 PowerPoint [1] - 804:20 Powers [1] - 736:16 PPCT [1] - 633:22 practice [5] - 668:19, 676:9, 684:8, 702:8, 702:14</p>	<p>practices [2] - 659:14, 737:17 Practices [5] - 673:9, 673:19, 675:22, 712:18, 817:18 precedence [1] - 704:13 precedent [1] - 782:25 preceding [1] - 609:25 precise [3] - 753:8, 792:22, 793:12 precision [1] - 758:5 precluded [1] - 737:24 preemptive [1] - 677:3 prefer [2] - 723:15, 830:4 preference [1] - 747:20 prejudice [3] - 741:14, 741:16, 756:25 premature [1] - 829:20 prepare [1] - 801:24 prepared [7] - 626:22, 694:16, 759:10, 782:11, 801:7, 807:12, 831:1 preparing [1] - 801:22 Preponderance [1] - 732:14 preponderance [21] - 742:1, 742:3, 742:7, 742:14, 742:20, 742:22, 743:12, 748:23, 750:22, 755:4, 757:10, 757:16, 757:18, 759:15, 759:25, 760:15, 777:14, 783:12, 818:12, 818:25, 833:18 prescribed [1] - 836:10 present [6] - 609:8, 726:15, 745:22, 762:2, 825:17, 829:2 presentation [1] - 626:21 presented [14] - 610:9, 692:16, 694:4, 720:18, 726:19, 741:7, 746:18, 751:12, 764:16, 781:2, 781:3, 797:14, 799:15, 808:21 presenting [2] - 701:14, 790:17 presents [3] - 617:17, 742:23, 742:24 preside [1] - 759:7</p>	<p>pressed [3] - 695:19, 771:14, 772:6 presumption [1] - 757:12 pretty [1] - 674:8 prevail [1] - 764:13 prevent [3] - 750:14, 750:15, 755:21 prevention [2] - 631:9, 631:12 previously [4] - 620:9, 635:3, 687:16, 745:21 pride [1] - 827:10 primary [1] - 655:15 Prince [7] - 607:17, 682:20, 764:8, 764:11, 783:20, 785:25, 822:19 PRINCE [2] - 682:22, 822:20 principle [1] - 692:6 print [3] - 663:12, 663:19, 815:20 printers [1] - 738:20 printing [1] - 729:22 prisons [1] - 630:7 Pritchard [1] - 610:10 private [1] - 774:9 probable [2] - 750:16, 758:6 problem [2] - 633:20, 677:7 procedure [1] - 676:21 proceed [12] - 609:10, 627:9, 639:17, 650:2, 682:2, 712:4, 735:9, 759:19, 760:9, 763:12, 810:25, 828:13 proceedings [3] - 609:4, 747:22, 836:7 Proceedings [3] - 607:12, 607:25, 609:1 process [4] - 668:2, 729:20, 739:24, 804:9 produced [2] - 607:25, 744:7 profession [4] - 632:15, 684:11, 684:20, 713:8 Professional [1] - 836:3 professional [2] - 650:23, 797:18 proffer [1] - 624:12 proffered [1] - 720:20 program [3] - 628:8,</p>
---	---	---	---	---

<p>629:24, 631:9 progress [2] - 813:17, 831:10 prohibited [6] - 692:20, 692:24, 776:3, 779:15, 779:19, 788:15 prohibitions [2] - 779:2, 779:5 project [2] - 816:23, 816:25 projector [2] - 649:22, 818:10 promised [1] - 739:22 promoted [2] - 628:22, 713:7 promptly [1] - 761:17 prong [1] - 738:11 pronounced [2] - 731:17, 731:18 proof [3] - 742:5, 743:8, 757:17 propensity [1] - 746:3 proper [5] - 615:13, 621:7, 738:7, 750:13, 788:2 properly [2] - 617:5, 743:5 proportional [1] - 756:17 proposal [1] - 719:24 propose [1] - 831:8 proposed [26] - 715:2, 715:9, 715:19, 716:2, 716:4, 716:9, 716:11, 716:12, 716:14, 716:16, 716:22, 716:25, 717:2, 718:3, 718:9, 718:14, 718:23, 719:11, 721:2, 721:7, 729:7, 730:8, 731:16, 731:17, 734:23, 808:15 proposition [1] - 755:8 protect [6] - 646:16, 778:10, 791:15, 793:15, 796:5, 827:10 protected [7] - 618:4, 754:20, 755:7, 760:18, 763:25, 784:12, 822:2 protecting [1] - 791:16 protection [5] - 628:22, 733:3, 734:16, 760:5, 784:7 protein [1] - 715:13</p>	<p>prove [19] - 632:22, 724:25, 741:25, 748:22, 750:22, 751:25, 752:7, 754:6, 755:3, 757:16, 758:4, 758:6, 764:18, 805:18, 818:16, 818:18, 818:19, 818:25, 825:2 proven [8] - 744:19, 759:15, 759:24, 760:14, 783:12, 818:12, 818:16, 833:18 provide [6] - 611:1, 623:10, 629:16, 631:25, 693:12, 820:16 provided [17] - 637:7, 642:11, 642:19, 643:11, 643:12, 647:25, 684:3, 684:25, 712:12, 713:9, 716:3, 741:9, 754:24, 759:11, 761:3, 815:5 provides [1] - 748:2 providing [1] - 791:21 proving [4] - 689:18, 731:14, 753:2, 818:20 provision [3] - 724:22, 725:22, 730:9 proximate [1] - 752:24 prudent [1] - 749:17 pry [1] - 785:17 psychological [1] - 798:20 public [13] - 621:10, 621:14, 622:11, 622:12, 622:14, 625:21, 655:21, 659:11, 684:6, 684:12, 741:16, 741:17, 798:9 publish [1] - 833:12 published [2] - 648:8, 833:9 pull [11] - 622:3, 691:7, 698:17, 699:16, 779:25, 806:25, 809:18, 814:2, 814:3, 814:4, 814:5 pulled [13] - 645:13, 671:20, 689:19, 699:14, 765:7, 780:19, 794:15, 809:20, 809:23,</p>	<p>810:8, 810:15, 812:25 Pullin [1] - 607:22 pulling [5] - 645:10, 648:15, 651:5, 652:2, 704:24 pulls [1] - 824:16 punch [2] - 635:13, 651:3 punching [1] - 648:18 punish [6] - 755:1, 755:9, 755:12, 755:20, 757:3, 784:20 punished [2] - 756:14, 784:21 punishment [1] - 754:23 punitive [58] - 609:13, 609:16, 609:18, 609:21, 610:6, 613:22, 614:3, 614:6, 614:14, 615:5, 615:11, 616:24, 617:8, 617:12, 617:24, 618:8, 618:12, 718:15, 725:19, 725:23, 726:9, 726:24, 727:3, 727:5, 727:6, 727:8, 727:15, 727:25, 728:21, 732:16, 754:16, 754:21, 754:25, 755:1, 755:3, 755:8, 755:12, 755:13, 755:19, 755:23, 755:24, 756:4, 756:6, 756:10, 756:18, 756:23, 756:24, 756:25, 760:24, 761:2, 761:3, 784:19, 821:17, 821:19, 822:6 punitives [1] - 729:1 pupils [1] - 636:15 pure [2] - 800:9, 802:14 purely [1] - 757:22 purpose [3] - 744:3, 758:24, 808:23 purposes [3] - 719:19, 755:8, 784:20 pursuant [1] - 612:3 pursue [3] - 613:1, 621:25, 658:20 pursuing [6] - 664:15, 669:21, 722:7,</p>	<p>722:8, 814:1, 822:8 pursuit [21] - 620:19, 621:21, 654:4, 654:9, 655:2, 655:5, 655:12, 655:18, 655:19, 655:23, 658:13, 664:16, 675:4, 721:11, 721:17, 793:9, 813:3, 813:13, 813:16, 813:18, 822:8 pursuits [1] - 655:9 push [3] - 651:3, 765:7, 773:11 pushed [3] - 802:13, 803:25, 804:1 pushing [3] - 648:17, 652:22, 653:1 put [40] - 614:18, 615:23, 616:15, 618:19, 620:3, 636:18, 636:22, 641:14, 645:5, 646:10, 656:15, 661:8, 661:23, 661:24, 663:7, 668:9, 668:16, 669:23, 674:20, 694:13, 705:18, 764:17, 766:7, 767:6, 768:9, 774:24, 776:8, 780:3, 781:21, 783:22, 795:10, 812:18, 814:21, 817:6, 824:13, 824:18, 826:24, 828:6, 832:7, 835:1 putting [8] - 618:13, 686:15, 721:13, 768:8, 774:25, 776:1, 780:21, 827:3 puzzle [1] - 767:6</p>	<p>724:10, 730:8, 736:7, 737:20, 737:25, 738:6, 738:11 qualify [1] - 639:7 quality [2] - 743:1 quantity [2] - 742:24, 743:2 quarter [1] - 633:22 quarterback [4] - 794:10, 794:16, 817:23, 822:13 questioned [1] - 699:4 questioning [4] - 624:9, 687:16, 701:11, 812:23 questions [45] - 637:17, 639:4, 645:16, 648:11, 648:12, 648:20, 650:17, 669:7, 680:1, 689:22, 692:3, 698:6, 699:25, 700:8, 703:7, 710:15, 711:25, 712:8, 712:11, 713:19, 743:20, 759:13, 759:14, 759:21, 761:9, 785:3, 785:12, 786:7, 791:9, 798:11, 801:2, 801:8, 802:4, 802:22, 808:17, 810:17, 810:22, 812:10, 812:17, 819:14, 820:3, 820:7, 820:8, 833:6 quick [3] - 710:14, 722:1, 828:24 quickly [3] - 666:12, 670:12, 693:13 quite [4] - 633:11, 723:25, 797:1, 812:12 quote [6] - 611:10, 611:11, 695:3, 788:24, 797:12</p>
				Q
				<p>qualification [1] - 636:11 qualifications [5] - 635:7, 638:22, 638:24, 639:1, 746:23 qualified [20] - 613:13, 636:2, 637:13, 639:11, 639:13, 715:22, 717:13, 717:20, 723:14, 723:17, 723:20, 723:23, 724:2,</p>
				R
				<p>race [1] - 647:14 radio [28] - 641:21, 643:10, 643:13, 653:14, 656:24, 657:1, 658:22, 675:4, 679:4, 703:12, 703:14, 703:21, 705:25, 706:4, 722:20,</p>

<p>736:22, 782:9, 791:24, 792:1, 792:3, 793:21, 794:7, 801:13, 813:2, 813:11, 813:16, 815:2 radioed [1] - 703:24 radios [2] - 662:14, 813:7 raised [4] - 762:12, 798:3, 799:8, 799:13 Rally [1] - 655:13 ran [6] - 770:25, 771:19, 773:24, 779:18, 780:10, 780:20 range [3] - 707:23, 824:11, 824:13 ranked [1] - 786:3 ranking [1] - 769:3 rapid [1] - 794:3 rapidly [12] - 645:1, 672:23, 765:1, 765:15, 765:23, 766:3, 768:5, 771:11, 771:12, 772:9, 780:16, 824:25 rather [5] - 685:3, 746:11, 750:3, 754:14, 757:1 rationale [1] - 644:8 Rawlings [2] - 647:23, 648:6 Rd [1] - 607:19 reach [3] - 655:8, 741:19, 831:1 reached [6] - 680:6, 714:3, 761:7, 831:20, 832:4, 832:21 reaching [5] - 746:20, 758:15, 776:13, 776:22, 777:9 react [1] - 736:21 reaction [12] - 634:17, 634:18, 648:15, 664:23, 665:18, 665:20, 665:21, 665:23, 665:25, 666:3, 666:16, 668:7 reacts [1] - 637:25 read [13] - 645:11, 683:23, 695:2, 715:19, 722:14, 722:15, 724:22, 728:5, 729:18, 810:8, 817:19, 832:6, 833:14 readily [1] - 668:11</p>	<p>reading [3] - 729:20, 740:5, 795:8 ready [13] - 626:12, 627:9, 682:2, 714:6, 714:8, 714:9, 738:22, 738:23, 739:17, 739:22, 763:5, 763:12, 795:25 real [1] - 710:14 reality [1] - 820:17 realize [5] - 621:4, 687:9, 688:22, 689:11, 826:13 realized [1] - 786:16 really [16] - 616:18, 623:9, 660:10, 705:21, 716:6, 768:12, 785:22, 785:24, 787:25, 808:12, 815:10, 821:4, 822:24, 826:11, 830:13, 833:6 realtime [1] - 607:25 rear [2] - 671:7, 806:11 rearrange [1] - 762:24 reason [21] - 610:6, 611:4, 635:5, 635:6, 651:23, 661:7, 705:23, 725:7, 725:14, 726:13, 738:12, 744:21, 747:6, 773:7, 781:19, 782:21, 798:6, 809:7, 810:1, 815:14, 822:6 reasonable [53] - 610:11, 611:5, 611:15, 624:18, 644:25, 646:9, 648:13, 648:14, 648:16, 666:4, 667:17, 669:4, 673:1, 674:11, 674:12, 676:10, 679:12, 682:14, 685:20, 686:14, 702:23, 710:11, 713:13, 721:15, 722:18, 723:5, 736:9, 737:18, 737:19, 744:19, 748:20, 749:13, 749:17, 750:2, 750:7, 750:11, 751:3, 751:8, 751:22, 756:7, 756:8, 756:19,</p>	<p>757:2, 759:17, 764:14, 813:23, 814:23, 817:10, 818:8, 818:17, 818:20, 819:2, 822:10 reasonableness [11] - 644:23, 646:7, 676:7, 702:24, 721:19, 749:20, 750:1, 750:5, 813:20, 817:20 reasonably [5] - 610:5, 610:14, 736:20, 750:23, 778:10 reasoning [1] - 644:8 reasons [8] - 619:1, 619:15, 717:2, 732:5, 732:19, 746:24, 782:20, 822:3 rebuttal [4] - 714:22, 735:15, 762:4, 822:19 receive [2] - 626:12, 634:24 received [9] - 634:21, 634:22, 637:7, 638:13, 640:9, 643:24, 744:2, 744:6, 829:21 receiving [1] - 832:20 recent [1] - 782:2 recess [2] - 680:24, 738:24 Recess [4] - 680:25, 715:16, 738:25, 829:11 reckless [16] - 609:23, 613:23, 613:25, 618:3, 618:15, 624:2, 725:25, 726:12, 754:19, 755:6, 755:17, 760:17, 784:11, 784:13, 784:16, 822:1 recognition [1] - 754:9 recognize [2] - 619:8, 835:4 recognizing [1] - 619:4 recollection [7] - 745:15, 747:20, 747:22, 747:25, 800:25, 806:5 recollections [2] - 687:18, 692:10</p>	<p>reconstructionist [2] - 638:6, 638:8 reconvene [1] - 715:14 record [13] - 617:6, 617:16, 694:22, 715:17, 716:1, 716:13, 721:16, 726:1, 726:11, 730:7, 732:10, 738:7, 744:10 recorded [1] - 607:25 recordings [1] - 793:24 recover [6] - 748:5, 752:4, 752:11, 752:21, 757:14, 757:19 recovered [1] - 757:23 recovery [1] - 758:3 red [3] - 651:11, 653:3, 809:2 redirect [1] - 712:2 REDIRECT [1] - 712:5 reel [1] - 787:11 refer [4] - 620:25, 623:23, 624:5, 711:6 reference [4] - 678:21, 707:1, 715:4, 747:23 referenced [1] - 665:17 references [1] - 791:4 referred [1] - 731:12 referring [4] - 691:10, 694:11, 709:13, 726:25 reflecting [1] - 618:6 reflects [1] - 620:13 refrain [7] - 685:10, 714:10, 714:12, 762:8, 762:11, 789:13, 789:16 refused [2] - 717:4, 801:8 refusing [2] - 652:2, 758:3 regard [45] - 619:23, 623:16, 623:22, 624:7, 624:17, 633:15, 635:2, 636:6, 637:14, 653:23, 654:8, 655:1, 658:11, 660:22, 661:4, 662:12, 668:18, 670:17, 671:11, 676:13, 678:5, 678:15, 678:19, 679:4, 679:7, 679:13, 689:5,</p>	<p>733:7, 734:24, 741:2, 750:9, 761:18, 791:3, 798:24, 802:17, 804:19, 809:21, 811:14, 812:3, 812:19, 812:21, 817:4, 817:20, 820:4, 821:16 regarding [4] - 610:8, 625:20, 730:13, 823:9 regardless [4] - 741:20, 744:5, 744:6, 790:21 regards [6] - 609:16, 611:16, 715:21, 724:18, 729:10, 732:11 Registered [1] - 836:3 regulated [1] - 655:11 reiterate [2] - 610:10, 790:19 reject [2] - 746:6, 747:16 rejected [4] - 716:14, 717:2, 717:4, 718:14 relate [1] - 823:14 related [8] - 617:9, 622:24, 628:24, 647:12, 685:18, 692:9, 785:9, 789:17 relates [3] - 694:7, 733:8, 787:18 relation [4] - 657:13, 701:20, 745:5, 811:5 relationship [4] - 734:11, 756:7, 756:9, 756:17 relative [1] - 638:22 relatively [1] - 618:10 relevant [5] - 639:2, 718:2, 734:8, 734:12, 820:20 reliable [5] - 687:18, 688:5, 689:13, 692:7, 692:10 relied [6] - 675:2, 675:4, 675:14, 693:1, 694:19 relies [2] - 610:20, 737:10 relish [1] - 819:24 reload [2] - 711:1 rely [7] - 610:8, 635:24, 650:14, 675:7, 747:21, 764:23, 812:11 relying [4] - 675:5, 694:3, 706:14,</p>
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<p>765:25 remain [2] - 680:11, 682:1 remained [3] - 711:8, 711:10, 831:6 remaining [4] - 718:16, 718:17, 734:20, 759:21 remains [1] - 725:5 remember [30] - 622:2, 635:10, 635:20, 656:6, 662:16, 677:10, 678:2, 683:21, 694:20, 701:11, 705:9, 705:10, 755:23, 759:1, 787:4, 787:8, 787:14, 794:6, 801:21, 802:20, 804:25, 806:25, 808:6, 808:8, 808:9, 809:17, 811:12, 813:7, 815:20 remembered [1] - 809:3 remembering [1] - 641:15 remind [2] - 681:25, 791:25 reminder [1] - 715:24 remotely [1] - 823:15 removal [1] - 734:13 remove [2] - 733:4, 733:22 removed [2] - 657:21, 732:17 removing [2] - 733:11, 733:13 render [1] - 738:5 renew [1] - 715:21 repeat [1] - 701:24 repeatedly [8] - 676:6, 696:9, 707:9, 794:17, 803:13, 804:14, 816:8, 817:14 report [7] - 643:3, 645:11, 709:4, 801:23, 802:2, 807:11, 835:4 reported [1] - 836:8 Reporter [3] - 836:3, 836:4, 836:15 reporting [1] - 793:25 reports [1] - 711:2 reprehensibility [1] - 756:11 represent [5] - 743:18, 758:11, 790:23,</p>	<p>819:13, 819:22 representation [3] - 650:20, 650:24, 797:20 representative [1] - 748:4 Representative [1] - 607:5 represented [2] - 809:22, 809:23 representing [3] - 686:6, 790:20, 821:15 repugnancy [1] - 756:11 request [3] - 629:18, 723:19, 832:7 requested [1] - 735:23 requests [1] - 808:15 require [2] - 749:3, 749:20 required [5] - 617:19, 725:14, 745:1, 755:23, 758:4 requirement [1] - 732:7 requirements [3] - 614:13, 621:15, 779:1 requires [3] - 613:23, 613:25, 743:11 research [23] - 644:7, 644:8, 646:1, 647:1, 648:21, 648:24, 649:8, 649:12, 649:13, 649:17, 649:18, 653:8, 691:4, 720:15, 723:20, 724:8, 725:9, 727:18, 816:23, 816:25, 817:12 research-wise [1] - 724:8 reserve [1] - 613:12 residue [2] - 768:23, 808:23 Resistance [1] - 649:3 resistance [2] - 649:7, 651:1 resisting [1] - 749:24 resolution [1] - 717:15 resolved [1] - 738:5 respect [31] - 613:8, 617:24, 618:12, 618:15, 618:19, 618:22, 618:24, 619:18, 620:7, 693:22, 715:6, 716:15, 716:18,</p>	<p>716:20, 716:23, 716:25, 717:13, 718:12, 719:10, 719:12, 721:1, 722:25, 723:19, 724:10, 729:7, 732:6, 732:20, 738:10, 750:4, 762:12, 776:6 respectively [1] - 619:18 respond [4] - 651:24, 704:11, 761:17, 791:2 responded [4] - 620:19, 654:4, 655:5, 658:12 respondents [1] - 653:4 responding [4] - 651:13, 674:9, 721:11, 778:22 response [19] - 621:9, 649:7, 649:19, 650:5, 650:13, 651:7, 652:7, 652:8, 652:21, 652:24, 653:8, 659:10, 683:24, 684:3, 727:20, 760:24, 781:20, 782:1, 822:16 Response [1] - 649:2 responses [4] - 646:6, 646:10, 650:25, 651:6 responsibility [1] - 729:25 responsible [1] - 790:13 rest [6] - 708:3, 714:21, 788:6, 791:6, 805:24, 821:25 rested [6] - 609:6, 626:22, 735:6, 736:5, 739:14, 739:19 resting [19] - 657:20, 664:8, 664:13, 667:24, 667:25, 674:3, 674:4, 678:22, 696:12, 696:17, 697:15, 698:11, 706:23, 707:1, 710:13, 803:14, 803:15 restore [1] - 753:12 restraint [1] - 647:12 restricted [1] - 753:10</p>	<p>rests [1] - 747:7 result [8] - 612:8, 612:20, 612:25, 649:17, 658:6, 711:22, 752:16, 752:24 resulted [2] - 752:17, 758:1 resulting [1] - 730:18 results [2] - 653:7, 745:18 resume [6] - 680:22, 680:23, 683:9, 683:11, 714:6, 789:19 resurvey [1] - 648:6 resurveyed [1] - 648:7 retained [5] - 631:17, 633:3, 685:17, 686:7, 766:21 retainer [1] - 640:2 retire [1] - 828:10 retired [5] - 630:22, 631:1, 631:2, 631:5, 632:1 retiring [1] - 759:5 return [8] - 617:22, 724:23, 754:4, 755:2, 758:12, 761:12, 762:1, 782:15 returned [4] - 739:10, 763:9, 832:16, 833:16 returning [1] - 758:25 rev [1] - 804:10 reverse [2] - 643:14, 815:2 review [15] - 640:3, 640:19, 642:18, 642:22, 642:25, 643:2, 643:8, 643:21, 643:23, 677:7, 727:4, 739:22, 759:12, 817:1, 832:6 reviewed [12] - 642:11, 643:18, 653:12, 653:13, 656:19, 682:15, 696:7, 697:2, 703:12, 712:16, 817:1, 817:2 reviewing [3] - 639:22, 640:3, 759:9 revise [2] - 722:12, 729:13 revision [1] - 802:6 revisions [1] - 729:22 revs [1] - 710:22</p>	<p>revved [1] - 765:13 revving [3] - 615:23, 700:4, 781:6 RHOADES [1] - 607:4 Rhoades [140] - 607:6, 609:5, 610:18, 614:1, 619:2, 619:8, 621:3, 621:10, 621:23, 623:7, 623:23, 623:25, 625:4, 654:10, 656:22, 656:25, 657:21, 658:6, 658:13, 658:21, 659:10, 675:3, 679:7, 688:16, 696:22, 700:15, 700:23, 703:2, 703:9, 703:15, 708:10, 711:9, 711:11, 711:12, 711:16, 719:18, 719:22, 719:23, 719:25, 720:18, 721:12, 721:14, 722:14, 722:16, 722:21, 724:24, 724:25, 730:16, 731:24, 733:4, 734:17, 736:21, 740:22, 748:3, 748:5, 748:7, 748:14, 748:15, 748:17, 748:22, 749:1, 749:7, 749:9, 749:11, 749:22, 749:23, 749:25, 750:22, 750:24, 751:5, 751:6, 751:10, 751:13, 751:19, 751:23, 752:6, 752:7, 752:8, 752:10, 752:14, 752:18, 752:19, 752:21, 752:23, 752:24, 753:1, 753:2, 753:5, 753:14, 753:15, 753:16, 753:21, 753:23, 754:5, 754:6, 755:7, 755:17, 756:1, 759:16, 760:4, 760:6, 760:19, 770:22, 771:1, 780:8, 783:14, 784:1, 784:8, 784:13, 784:17, 788:10, 788:12, 794:7, 797:4, 797:19, 803:3,</p>
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<p>803:9, 804:5, 804:21, 805:3, 812:15, 812:16, 814:11, 815:9, 815:12, 816:1, 818:14, 819:11, 820:3, 820:5, 820:7, 820:13, 820:24, 821:3, 821:24, 822:2, 827:6, 833:16, 833:20</p> <p>Rhoades' [8] - 612:12, 612:13, 614:24, 657:2, 723:3, 749:4, 754:3, 793:18</p> <p>Rick [7] - 785:4, 785:8, 785:11, 785:15, 788:10, 788:12, 819:11</p> <p>ricochets [1] - 671:3</p> <p>ridiculous [2] - 683:17, 815:8</p> <p>rights [14] - 613:25, 618:4, 754:8, 754:17, 754:20, 755:7, 760:18, 764:1, 770:19, 774:20, 777:23, 784:12, 784:17, 822:2</p> <p>riots [2] - 647:14, 648:5</p> <p>rise [1] - 614:13</p> <p>risk [18] - 620:19, 620:22, 620:23, 621:2, 621:10, 621:14, 622:14, 654:4, 655:5, 655:19, 656:1, 656:3, 658:13, 659:11, 664:16, 726:15, 736:19, 793:9</p> <p>Rita's [1] - 646:13</p> <p>road [83] - 622:2, 622:7, 640:23, 657:2, 657:3, 657:4, 657:6, 657:10, 657:11, 657:15, 657:16, 657:18, 659:7, 660:2, 660:9, 660:10, 661:13, 661:15, 661:16, 661:21, 662:12, 662:14, 662:19, 663:9, 663:11, 663:16, 663:18, 664:5, 664:15, 664:17, 665:5, 667:2, 667:7, 669:9,</p>	<p>674:10, 679:5, 679:8, 679:9, 684:22, 703:19, 704:3, 708:3, 710:17, 713:5, 713:7, 737:3, 767:12, 767:13, 767:17, 767:18, 767:22, 770:20, 770:24, 771:15, 772:1, 778:20, 792:15, 792:19, 793:1, 793:9, 793:18, 796:4, 797:13, 797:16, 797:22, 803:16, 806:21, 806:24, 807:2, 807:4, 807:5, 814:2, 815:15, 816:3, 816:6, 821:22, 827:2, 835:18</p> <p>Road [1] - 607:16</p> <p>roads [1] - 655:16</p> <p>roadway [3] - 660:11, 705:19, 767:25</p> <p>Robinson [1] - 630:4</p> <p>rolled [4] - 668:13, 698:1, 710:9, 771:13</p> <p>rolling [2] - 630:24, 670:23</p> <p>Rolling [1] - 736:13</p> <p>roof [1] - 611:10</p> <p>room [12] - 627:20, 670:9, 740:17, 759:5, 759:12, 761:6, 761:24, 762:5, 801:15, 823:13, 828:11, 835:4</p> <p>rooms [1] - 829:6</p> <p>root [2] - 662:3, 674:14</p> <p>Root [67] - 634:20, 639:12, 642:24, 643:15, 644:24, 648:23, 656:5, 656:8, 658:25, 663:20, 664:23, 665:2, 665:6, 666:24, 667:12, 667:13, 667:22, 668:2, 668:10, 668:18, 669:14, 672:5, 672:22, 675:5, 675:18, 675:22, 676:12, 687:9, 691:1, 696:19, 746:15, 769:20, 770:10,</p>	<p>774:6, 775:15, 792:11, 792:24, 794:2, 794:8, 794:11, 794:15, 796:14, 796:25, 797:5, 798:8, 798:12, 799:15, 799:21, 799:24, 802:25, 804:16, 806:3, 806:21, 807:4, 809:14, 809:18, 809:23, 809:25, 810:17, 811:2, 814:24, 815:19, 816:16, 817:3, 817:9, 817:14, 817:21</p> <p>root's [2] - 798:5, 798:15</p> <p>Root's [12] - 634:6, 634:13, 654:7, 655:1, 660:15, 662:22, 673:13, 677:24, 678:5, 791:18, 796:6, 810:11</p> <p>Rotary [1] - 646:11</p> <p>round [2] - 658:7, 696:21</p> <p>rounds [10] - 657:24, 658:5, 658:6, 671:1, 671:9, 691:6, 710:25, 826:24, 827:5</p> <p>Route [2] - 621:23, 813:6</p> <p>RPMs [1] - 804:2</p> <p>RPR [1] - 836:14</p> <p>rubber [2] - 770:5, 828:5</p> <p>rude [1] - 680:21</p> <p>rule [6] - 616:15, 692:11, 707:22, 740:25, 743:9, 745:23</p> <p>RULE [1] - 608:2</p> <p>Rule [11] - 609:9, 613:8, 613:13, 613:20, 715:21, 717:14, 723:16, 723:18, 736:1, 736:6, 738:3</p> <p>ruled [1] - 635:22</p> <p>rules [10] - 639:14, 740:12, 740:19, 741:8, 743:23, 763:15, 778:1, 780:5, 783:2</p> <p>ruling [6] - 618:10, 618:21, 625:5,</p>	<p>726:22, 743:24</p> <p>rulings [7] - 618:6, 619:19, 620:1, 620:25, 621:8, 623:16, 727:1</p> <p>run [23] - 621:11, 622:20, 622:23, 623:7, 624:8, 624:19, 659:12, 720:20, 729:15, 771:22, 779:23, 780:12, 784:18, 824:6, 824:7, 824:8, 824:9, 824:15, 824:16, 826:9, 826:22, 826:23</p> <p>running [24] - 610:18, 614:22, 614:25, 615:18, 623:4, 657:23, 705:1, 765:6, 765:10, 766:11, 766:12, 771:17, 775:13, 775:14, 775:18, 779:16, 781:3, 800:6, 800:13, 800:17, 800:23, 827:22</p> <p>runs [3] - 692:22, 779:8, 779:14</p> <p>rural [2] - 667:18</p> <p>Ryan [2] - 607:15, 682:6</p>	<p>662:14, 663:8, 664:2, 664:4, 664:6, 664:7, 674:16, 677:10, 677:22, 693:20, 716:10, 717:8, 764:20, 767:12, 769:12, 770:24, 773:20, 778:19, 782:11, 787:9, 788:24, 803:6, 808:4, 811:14, 811:17, 811:18, 812:24, 826:11</p> <p>scale [1] - 645:19</p> <p>scenarios [2] - 636:23, 707:19</p> <p>scene [27] - 610:22, 615:10, 615:22, 624:13, 638:6, 642:3, 642:8, 642:9, 643:5, 663:6, 675:8, 675:10, 675:12, 704:5, 704:9, 704:15, 706:21, 750:3, 766:5, 767:7, 768:1, 773:1, 774:13, 774:16, 775:3, 801:12, 816:1</p> <p>schedule [2] - 735:4, 739:17</p> <p>school [1] - 646:12</p> <p>School [1] - 646:13</p> <p>science [1] - 664:25</p> <p>Science [8] - 634:9, 634:12, 634:21, 634:24, 665:17, 678:12, 691:5, 817:13</p> <p>scientific [8] - 651:2, 662:4, 662:5, 662:7, 701:15, 706:1, 708:2, 804:17</p> <p>scientifically [2] - 697:24, 701:3</p> <p>scratch [2] - 695:5, 831:18</p> <p>screen [3] - 650:8, 650:10, 692:2</p> <p>seal [1] - 831:23</p> <p>search [1] - 654:23</p> <p>searching [1] - 655:2</p> <p>seat [2] - 660:19, 671:3</p> <p>seatbelt [2] - 669:24, 669:25</p> <p>seated [9] - 609:3, 626:19, 680:17, 739:13, 762:19, 763:11, 790:4,</p>
---	---	--	---	--

S

safe [1] - 663:13

safety [2] - 749:22,
755:18

salary [1] - 638:13

sale [1] - 685:15

Sam [4] - 627:2,
631:7, 634:2, 775:13

SAMUEL [2] - 608:4,
627:6

Samuel [2] - 627:15,
746:15

sat [5] - 706:17,
766:13, 769:7,
770:10, 781:16

satisfied [1] - 829:2

Savasman [4] -
802:20, 804:23,
805:9, 805:16

Savasman's [2] -
731:23, 805:5

save [2] - 711:20,
785:18

saw [32] - 621:23,
655:24, 660:4,

<p>832:18, 835:12 second [19] - 657:4, 659:4, 659:9, 665:10, 665:12, 665:13, 665:14, 720:6, 736:14, 740:19, 748:25, 749:3, 767:15, 787:22, 791:14, 792:10, 796:10, 807:14, 835:6 secondary [1] - 655:15 seconds [34] - 649:2, 657:9, 662:17, 665:21, 665:22, 665:25, 666:3, 666:8, 666:9, 666:10, 701:21, 704:19, 706:7, 736:20, 737:3, 780:1, 780:2, 791:24, 792:11, 792:15, 792:25, 795:5, 795:7, 795:12, 795:16, 795:19, 795:21, 795:23, 796:2, 796:5, 828:2, 828:3 Section [1] - 612:4 section [3] - 628:5, 726:25, 783:21 sections [1] - 716:11 secure [1] - 704:9 security [5] - 628:11, 759:22, 760:22, 761:16, 833:1 SECURITY [1] - 831:19 see [71] - 641:20, 645:23, 648:4, 649:5, 649:23, 649:24, 649:25, 651:18, 654:25, 655:10, 655:16, 657:25, 663:6, 664:5, 665:19, 666:6, 667:5, 670:11, 674:6, 674:20, 677:11, 677:12, 680:9, 680:13, 689:4, 689:15, 691:19, 693:15, 693:17, 693:23, 694:11, 695:14, 695:17, 698:1, 704:23, 707:18, 710:18, 710:19, 714:15, 716:24, 725:7,</p>	<p>745:13, 763:19, 764:20, 764:21, 767:25, 768:2, 768:3, 770:21, 770:22, 773:5, 778:14, 779:9, 781:22, 781:24, 789:23, 806:18, 811:15, 811:18, 811:20, 813:14, 814:5, 814:7, 820:13, 826:21, 827:2, 827:22, 829:9, 830:18, 831:9 seeing [7] - 650:1, 770:1, 776:8, 787:14, 806:6, 806:20, 811:23 seek [3] - 733:5, 741:7, 759:3 sees [8] - 672:2, 705:5, 705:7, 806:19, 811:9, 813:6, 813:12, 827:5 select [2] - 759:5, 828:13 selection [1] - 739:23 self [1] - 764:19 seminal [1] - 722:2 send [3] - 649:11, 761:19, 827:11 sense [12] - 612:2, 645:20, 672:20, 677:21, 744:22, 747:6, 766:1, 770:21, 772:13, 773:14, 809:9 sensory [1] - 636:14 sent [3] - 628:13, 637:1, 646:22 sentence [1] - 722:14 separate [7] - 676:23, 676:25, 677:5, 708:15, 723:18, 731:13, 811:8 separated [4] - 709:7, 785:19, 786:8, 786:9 separately [2] - 808:13, 808:15 September [1] - 808:6 Sergeant [7] - 642:20, 668:12, 708:23, 774:21, 774:24, 775:3, 823:25 sergeant [2] - 808:16, 810:14 series [2] - 634:16, 759:13 serious [7] - 621:11, 622:10, 622:15,</p>	<p>659:11, 750:18, 750:24, 778:12 seriously [1] - 778:12 serve [7] - 646:16, 650:25, 684:9, 684:19, 755:20, 759:6, 834:25 served [1] - 631:4 service [5] - 658:1, 794:17, 834:22, 835:2, 835:8 services [6] - 630:8, 633:4, 733:3, 734:16, 760:5, 784:7 serving [6] - 632:7, 759:3, 764:19, 790:9, 827:10, 832:22 set [8] - 724:8, 735:11, 761:25, 762:15, 769:15, 778:5, 795:21, 835:18 setting [2] - 631:8, 631:12 seven [20] - 616:4, 657:24, 658:5, 689:7, 710:25, 716:22, 717:17, 719:20, 721:4, 721:7, 730:13, 772:10, 780:4, 788:4, 788:9, 824:17, 826:24, 827:5, 829:15, 834:15 several [1] - 737:8 severance [1] - 731:25 severe [2] - 611:25, 670:3 severed [1] - 766:17 severity [2] - 721:20, 749:24 shakes [1] - 650:1 shall [2] - 779:5, 835:23 shards [1] - 671:2 share [2] - 639:14, 646:3 shell [2] - 691:12, 691:25 sheriff [1] - 641:4 sheriff's [1] - 809:5 Sheriff's [8] - 621:15, 630:3, 702:6, 702:11, 778:8, 813:2, 813:14, 822:9 sheriffs [1] - 633:25 shielded [2] - 736:8, 737:20 shift [12] - 766:6,</p>	<p>773:5, 775:22, 777:13, 796:12, 802:11, 802:12, 803:23, 804:6, 804:7, 805:20, 805:22 shifter [1] - 773:17 shifting [2] - 804:9, 804:12 shoot [9] - 651:15, 766:2, 768:25, 779:16, 779:22, 780:9, 784:18, 805:1, 823:11 shooting [34] - 615:1, 615:3, 616:3, 617:2, 617:10, 622:9, 636:12, 644:14, 647:17, 678:1, 678:20, 691:6, 691:9, 694:8, 700:5, 703:3, 704:8, 704:20, 704:21, 708:12, 731:1, 736:23, 751:15, 764:20, 765:3, 765:23, 773:1, 774:10, 793:13, 799:2, 811:11, 812:7, 828:1 shoots [1] - 824:13 shores [1] - 787:6 short [3] - 710:17, 795:11, 795:19 shortly [1] - 786:16 shot [31] - 625:12, 625:14, 671:1, 688:16, 688:25, 689:9, 689:10, 691:6, 697:3, 698:9, 700:15, 703:2, 748:15, 768:24, 773:10, 773:15, 775:19, 776:7, 776:9, 776:21, 776:22, 776:23, 777:2, 777:3, 777:23, 779:18, 785:1, 824:4, 824:5, 824:11, 824:19 Shots [1] - 795:6 shots [9] - 657:8, 696:21, 711:2, 772:10, 780:4, 794:25, 795:1, 824:17, 826:16 shoulder [1] - 677:16 show [30] - 615:24, 646:16, 683:3, 693:22, 695:14,</p>	<p>707:9, 768:18, 778:5, 781:7, 781:8, 782:12, 795:15, 797:9, 798:6, 803:1, 808:2, 812:2, 814:9, 814:10, 814:12, 814:13, 814:17, 822:25, 823:1, 823:5, 823:17, 824:21, 826:25, 827:1, 831:17 showed [7] - 693:10, 693:11, 712:25, 767:4, 802:11, 802:18, 818:11 showing [4] - 684:10, 745:21, 773:5, 807:16 shown [4] - 746:1, 747:13, 754:18, 790:15 shows [6] - 650:13, 651:25, 657:22, 670:11, 782:23, 815:22 shut [2] - 805:11, 805:13 sic [1] - 624:24 side [26] - 618:20, 624:23, 624:25, 677:12, 677:14, 687:10, 694:14, 742:10, 742:11, 742:15, 742:22, 742:24, 745:6, 771:9, 773:16, 775:9, 776:22, 794:12, 806:9, 806:15, 810:7 side-by-side [2] - 694:14, 775:9 side-to-side [1] - 771:9 sidetracked [1] - 653:11 sight [1] - 654:22 sign [6] - 665:19, 759:21, 760:21, 761:5, 761:12, 819:5 signal [1] - 751:18 signaled [1] - 656:23 signature [1] - 643:16 signed [3] - 829:14, 833:22, 833:23 significant [5] - 617:1, 750:17, 750:24, 769:9, 821:7 signs [1] - 829:15 similar [7] - 718:20, 728:19, 737:22,</p>
---	---	--	--	---

<p>748:21, 749:15, 755:22, 756:13 similarly [1] - 769:14 simple [2] - 742:7, 782:9 simply [9] - 611:13, 613:24, 652:11, 692:22, 743:11, 765:8, 779:14, 784:4, 822:11 simulated [2] - 636:23, 641:21 Sinclair [1] - 628:21 sing [2] - 795:22, 795:23 single [27] - 614:23, 615:1, 703:14, 740:14, 764:17, 765:4, 766:24, 777:17, 777:18, 780:25, 781:10, 781:12, 781:15, 785:4, 786:11, 788:7, 812:6, 812:14, 812:19, 819:10, 822:25, 823:1, 823:5, 823:13, 823:17, 827:18 singular [1] - 823:8 sister's [1] - 820:12 sit [5] - 659:19, 767:15, 785:15, 815:11, 815:13 site [28] - 625:20, 640:22, 640:25, 641:3, 641:5, 641:11, 641:14, 642:10, 644:1, 649:12, 653:15, 654:10, 660:3, 660:17, 661:10, 701:7, 770:20, 772:1, 780:1, 780:19, 794:15, 802:9, 810:15, 814:5, 816:15, 818:1, 827:1 sitting [7] - 615:25, 656:19, 705:13, 773:14, 775:5, 777:12, 826:4 situated [1] - 806:6 situation [15] - 618:3, 636:12, 643:25, 645:1, 656:4, 658:10, 666:6, 666:18, 672:24, 677:23, 736:15, 736:18, 736:21,</p>	<p>791:14, 793:14 situations [2] - 636:18, 825:17 six [9] - 652:14, 660:5, 716:20, 717:11, 717:16, 816:10, 834:13 size [2] - 630:25, 773:19 sketch [1] - 705:22 skills [1] - 728:13 skip [4] - 759:21, 760:8, 760:20, 784:10 sky [1] - 805:1 slams [1] - 774:1 slapped [1] - 645:13 sleep [1] - 678:13 slide [3] - 666:13, 796:14, 798:25 slightly [2] - 698:2, 777:5 slip [2] - 668:10, 668:11 slips [1] - 668:11 sliver [1] - 780:24 slow [3] - 696:10, 700:5, 765:16 slowing [1] - 696:4 slumped [3] - 804:5, 804:6, 805:22 small [2] - 762:9, 789:14 Smith [2] - 609:20 society [6] - 619:7, 733:3, 734:16, 754:1, 760:5, 784:7 soft [3] - 768:1, 768:2, 813:4 solace [5] - 733:9, 734:9, 754:1, 760:4, 783:23 sole [2] - 744:24, 759:2 solely [4] - 733:8, 744:17, 747:7, 758:23 someone [18] - 615:25, 616:4, 622:8, 654:22, 677:1, 697:2, 746:19, 767:15, 769:24, 771:10, 776:2, 778:20, 779:22, 790:12, 791:5, 823:11, 825:10, 827:12 someplace [1] - 667:9 sometimes [3] - 636:16, 676:24,</p>	<p>771:23 somewhat [1] - 662:4 somewhere [4] - 647:6, 651:6, 664:10, 770:5 son [4] - 771:4, 788:13, 788:14, 821:4 sons [2] - 754:3, 820:5 soon [5] - 738:21, 809:19, 809:23, 810:8, 810:14 sorrow [4] - 733:9, 734:8, 753:25, 760:3 Sorrow [1] - 783:23 sorry [4] - 642:7, 694:2, 701:13, 719:14 sort [4] - 624:20, 690:16, 731:13, 754:23 sorts [2] - 687:10, 733:25 sought [2] - 734:1, 820:9 sound [2] - 611:11, 725:5 sounded [1] - 616:8 sounds [4] - 625:6, 625:8, 626:2, 824:7 Southern [2] - 635:9, 683:20 space [2] - 669:24, 699:16 SPEAKER [1] - 720:6 Speaker [1] - 646:11 speaking [1] - 743:4 special [2] - 707:20, 746:17 specialist [2] - 627:24, 628:1 specialists [1] - 634:15 specific [4] - 653:6, 689:19, 722:3, 806:7 specifically [18] - 609:18, 615:16, 637:14, 643:18, 664:21, 673:13, 679:13, 699:22, 700:2, 700:24, 701:18, 724:19, 737:15, 788:15, 797:25, 803:21, 810:22, 820:24 specify [3] - 759:25, 760:11, 761:2 speculate [5] - 661:19, 781:1, 802:15, 815:18,</p>	<p>817:4 speculated [1] - 815:19 speculation [16] - 658:7, 658:8, 688:8, 688:13, 688:17, 688:20, 688:22, 689:1, 690:16, 757:22, 773:18, 775:24, 800:9, 802:14, 803:12 speculative [3] - 757:23, 777:19, 803:18 speed [11] - 633:20, 661:1, 661:19, 661:22, 661:23, 665:5, 666:8, 668:8, 705:24, 708:1, 708:2 speedometer [1] - 793:10 spending [1] - 821:6 spent [9] - 617:25, 639:22, 712:7, 785:25, 792:12, 799:15, 812:12, 816:10, 823:1 spinal [6] - 731:25, 766:15, 766:17, 776:19, 777:2, 777:4 spine [1] - 805:10 spinning [22] - 615:22, 694:24, 695:12, 698:25, 699:1, 699:6, 699:12, 700:3, 700:10, 700:14, 700:22, 701:5, 765:23, 768:4, 768:9, 768:18, 772:9, 775:2, 781:6, 781:7, 823:21, 824:25 split [2] - 791:14, 829:15 split-second [1] - 791:14 spoil [1] - 826:1 spokesperson [1] - 759:8 sponte [1] - 832:8 spot [1] - 714:3 spouse [1] - 754:4 Sq [1] - 607:23 squad [2] - 657:16, 704:14 St [1] - 646:12 stack [1] - 828:25 stage [3] - 717:23, 723:18, 737:23</p>	<p>stages [2] - 668:4, 668:7 stairways [1] - 667:5 stake [1] - 748:8 stalls [1] - 765:11 stamp [1] - 828:5 stamped [1] - 770:5 stand [26] - 621:22, 642:5, 680:23, 680:24, 712:22, 733:24, 738:24, 741:23, 745:5, 761:20, 763:19, 765:5, 774:22, 786:2, 791:19, 795:6, 796:8, 801:3, 802:21, 810:5, 812:5, 812:11, 812:13, 815:7, 820:4, 835:23 standard [18] - 617:18, 618:2, 618:10, 643:16, 646:7, 650:21, 669:17, 671:5, 691:6, 727:10, 727:17, 727:25, 732:15, 738:3, 750:4, 764:14, 765:5, 776:17 Standard [1] - 628:3 standards [3] - 629:3, 632:18, 728:21 Standards [1] - 675:1 standing [13] - 691:4, 691:14, 695:24, 696:20, 697:13, 741:22, 770:22, 772:10, 776:11, 776:23, 777:1, 811:7, 811:8 standpoint [1] - 833:6 stands [1] - 779:22 Stanford [2] - 683:20, 713:1 start [16] - 626:22, 640:6, 654:2, 659:6, 681:5, 687:19, 729:22, 743:3, 767:22, 792:11, 792:25, 795:25, 803:17, 814:5, 814:7, 826:6 started [25] - 629:24, 631:21, 636:25, 641:22, 645:8, 645:23, 646:5, 646:10, 646:19, 650:4, 682:25, 683:8, 683:10,</p>
--	---	--	---	---

<p>700:3, 763:2, 767:23, 787:9, 809:20, 809:24, 810:8, 810:15, 812:25, 828:1</p> <p>starting [9] - 624:25, 650:6, 660:2, 662:12, 672:2, 679:5, 706:2, 706:4, 716:3</p> <p>starts [7] - 666:25, 768:4, 774:2, 792:16, 813:13, 814:6, 826:6</p> <p>State [11] - 628:12, 628:13, 628:18, 629:15, 630:11, 630:12, 634:3, 643:2, 666:2, 793:7, 808:16</p> <p>state [35] - 611:18, 620:7, 620:8, 629:20, 629:24, 674:13, 675:10, 686:13, 691:25, 693:7, 694:7, 716:16, 717:5, 718:1, 718:16, 727:7, 727:16, 728:2, 728:14, 728:15, 740:23, 743:15, 745:4, 748:24, 748:25, 766:13, 774:6, 774:8, 774:15, 775:19, 786:4, 793:5, 800:2, 816:20</p> <p>statement [53] - 615:13, 615:14, 615:15, 653:17, 656:11, 675:25, 676:1, 676:11, 676:15, 678:9, 683:17, 689:11, 701:6, 701:25, 716:7, 722:19, 726:6, 726:14, 727:24, 737:12, 737:13, 764:19, 764:24, 769:14, 769:19, 772:15, 797:7, 797:11, 797:14, 797:24, 797:25, 798:4, 798:25, 799:1, 799:9, 799:11, 799:14, 801:7, 807:1, 808:2, 808:4, 810:4, 810:9, 812:2, 812:4, 812:8, 812:9,</p>	<p>812:22, 812:23, 820:1, 821:22</p> <p>statements [44] - 610:23, 610:24, 642:18, 653:15, 653:18, 675:5, 676:14, 676:18, 677:6, 677:20, 678:7, 678:8, 694:14, 708:14, 743:14, 744:16, 745:22, 745:24, 746:1, 747:11, 767:7, 769:12, 769:23, 797:21, 798:17, 799:5, 799:8, 799:12, 799:17, 799:20, 799:21, 799:22, 799:24, 801:1, 801:5, 801:13, 806:3, 806:23, 807:7, 808:13, 808:15, 808:19, 810:16</p> <p>states [7] - 628:2, 628:15, 634:3, 645:4, 647:1, 760:9, 816:21</p> <p>STATES [1] - 607:1</p> <p>States [18] - 614:10, 630:7, 631:9, 631:12, 669:18, 763:17, 763:21, 776:3, 778:2, 779:20, 779:21, 780:6, 782:25, 784:6, 788:22, 836:4, 836:11, 836:15</p> <p>states' [1] - 646:23</p> <p>stating [4] - 622:17, 690:13, 740:14, 761:10</p> <p>station [1] - 630:5</p> <p>stationary [4] - 703:6, 826:14, 826:20</p> <p>statue [1] - 728:5</p> <p>status [1] - 782:17</p> <p>statute [4] - 612:3, 727:3, 728:1, 751:25</p> <p>statutes [1] - 728:18</p> <p>statutory [1] - 728:10</p> <p>stay [3] - 713:8, 796:23, 820:11</p> <p>stayed [2] - 627:18, 669:16</p> <p>steep [1] - 794:13</p> <p>steer [1] - 672:16</p> <p>stenotypy [1] - 836:8</p>	<p>step [7] - 627:4, 656:6, 659:7, 672:6, 713:25, 762:14</p> <p>step-by-step [1] - 659:7</p> <p>stepping [1] - 641:22</p> <p>steps [1] - 780:4</p> <p>Stevens [1] - 821:7</p> <p>stick [1] - 803:23</p> <p>still [27] - 616:12, 630:5, 647:2, 649:4, 666:13, 669:23, 671:24, 685:5, 689:6, 694:1, 705:13, 712:15, 713:11, 713:12, 727:9, 729:25, 738:3, 763:15, 766:8, 766:11, 766:12, 770:15, 778:1, 781:3, 789:6, 802:7, 831:11</p> <p>sting [1] - 636:24</p> <p>stipulate [1] - 660:8</p> <p>stipulated [3] - 620:9, 744:7, 749:3</p> <p>stipulation [1] - 716:15</p> <p>stone [1] - 730:25</p> <p>stood [6] - 687:11, 690:10, 696:5, 780:21, 823:4, 823:16</p> <p>Stop [1] - 814:17</p> <p>stop [47] - 620:22, 620:23, 621:1, 621:2, 640:25, 645:17, 645:18, 649:21, 656:22, 660:14, 660:22, 665:19, 666:12, 666:15, 667:8, 667:11, 668:9, 669:25, 671:8, 692:21, 696:10, 700:4, 704:15, 709:17, 709:18, 709:20, 721:13, 721:14, 735:22, 736:20, 751:18, 765:16, 765:18, 766:2, 766:3, 767:21, 767:22, 776:1, 779:7, 779:13, 779:25, 792:10, 814:9, 814:12, 814:13</p> <p>stopped [19] - 642:7, 650:4, 661:4, 668:12, 669:15,</p>	<p>669:16, 696:4, 697:25, 700:6, 710:7, 710:8, 710:9, 731:18, 766:10, 771:12, 780:17, 809:22, 825:1, 826:5</p> <p>stopping [2] - 696:4, 706:4</p> <p>stops [2] - 765:24, 772:10</p> <p>store [1] - 787:13</p> <p>story [16] - 767:4, 767:9, 768:14, 768:16, 773:22, 776:12, 780:11, 781:5, 786:19, 786:22, 787:18, 789:4, 805:24, 827:21, 827:24</p> <p>straight [24] - 695:23, 695:24, 696:15, 697:1, 697:5, 697:6, 697:9, 697:17, 697:20, 698:14, 698:16, 698:18, 765:15, 765:17, 769:21, 770:22, 771:8, 772:10, 772:22, 781:13, 799:20, 803:4, 815:11</p> <p>straight-faced [1] - 781:13</p> <p>straighten [1] - 699:17</p> <p>stray [1] - 725:7</p> <p>street [2] - 636:20, 736:11</p> <p>stress [10] - 618:25, 634:17, 636:12, 637:25, 678:1, 793:13, 794:3, 798:19, 811:11</p> <p>stress-inducing [4] - 678:1, 793:13, 794:3, 798:19</p> <p>stretch [1] - 680:8</p> <p>stricken [1] - 744:10</p> <p>strike [4] - 624:3, 648:18, 720:21, 796:21</p> <p>strikes [1] - 789:9</p> <p>striking [1] - 733:19</p> <p>struck [8] - 625:4, 656:23, 658:4, 658:7, 703:9, 803:10, 804:13, 805:4</p> <p>stuck [1] - 728:20</p> <p>studies [7] - 644:7, 644:9, 647:5, 647:8,</p>	<p>707:13, 817:12</p> <p>stuff [8] - 648:5, 662:8, 666:14, 668:13, 677:3, 696:23, 768:22, 770:9</p> <p>stupid [1] - 669:6</p> <p>styled [2] - 607:12, 836:7</p> <p>sua [1] - 832:8</p> <p>subject [12] - 629:6, 648:19, 651:4, 651:12, 652:11, 658:23, 670:9, 670:22, 671:6, 707:20, 788:2</p> <p>subjected [3] - 748:14, 749:7, 753:24</p> <p>subjective [5] - 687:15, 687:18, 688:5, 689:14, 692:7</p> <p>submit [3] - 732:3, 818:21, 820:19</p> <p>submitted [6] - 720:13, 720:17, 723:22, 781:17, 801:23, 801:24</p> <p>subsequent [2] - 725:10, 832:20</p> <p>substance [1] - 677:2</p> <p>substantive [4] - 681:4, 715:5, 716:11, 727:6</p> <p>substitute [1] - 747:5</p> <p>suddenly [1] - 700:6</p> <p>sued [2] - 612:20, 646:20</p> <p>suffer [3] - 748:17, 749:11, 753:6</p> <p>suffered [6] - 753:21, 753:22, 754:10, 757:11, 785:10, 798:19</p> <p>suffering [11] - 718:13, 730:16, 730:19, 731:4, 752:19, 753:1, 753:3, 753:5, 760:4, 783:25, 805:14</p> <p>sufficient [7] - 616:20, 617:17, 617:22, 618:14, 732:2, 738:4, 755:20</p> <p>suggest [5] - 610:2, 616:6, 719:19, 720:21, 757:5</p> <p>suggestion [1] - 722:10</p> <p>suggestions [1] -</p>
---	---	---	--	---

<p>681:6 suggests [1] - 722:7 suit [1] - 790:12 Suite [1] - 607:19 sum [1] - 752:22 summary [8] - 610:9, 635:15, 635:21, 635:25, 717:3, 717:23, 737:22, 737:24 summation [2] - 823:16, 824:21 sun [1] - 662:1 supervision [1] - 629:25 supervisor [1] - 655:17 supplemental [3] - 642:15, 653:22, 802:2 supplies [1] - 816:2 support [17] - 610:16, 611:1, 615:22, 618:14, 720:14, 721:22, 726:8, 742:10, 742:11, 775:1, 775:8, 777:18, 781:5, 781:11, 807:6, 820:16, 827:18 supported [3] - 745:8, 797:22, 802:7 supports [2] - 819:15, 821:11 supposed [5] - 780:25, 781:1, 790:24, 799:23, 809:14 supposedly [1] - 685:2 Supreme [14] - 609:19, 621:12, 644:13, 659:12, 673:8, 673:16, 674:25, 675:21, 679:21, 712:17, 779:21, 780:13, 782:25, 817:17 sure. [1] - 623:2 surgeries [2] - 652:14 surprise [1] - 666:6 surprised [1] - 766:20 surrender [1] - 758:22 surrounding [2] - 628:15, 634:3 survey [12] - 645:21, 646:18, 647:10, 647:11, 647:21, 647:25, 648:10, 650:16, 652:23,</p>	<p>653:4, 707:21 surveyed [1] - 647:17 surveying [1] - 646:6 surveys [1] - 707:13 survivability [1] - 619:15 survivable [1] - 619:2 survival [1] - 612:24 survive [1] - 612:12 survived [2] - 612:22, 620:16 survives [1] - 612:7 suspect [11] - 652:4, 708:19, 750:14, 750:17, 750:19, 795:14, 796:9, 796:20, 814:16, 818:5, 822:8 suspect's [1] - 651:19 suspects [1] - 797:1 suspicion [3] - 692:21, 779:8, 779:13 suspicious [1] - 693:23 sustained [7] - 743:25, 744:8, 752:15, 752:23, 766:14, 786:6, 796:23 SUV [1] - 806:17 Swanson [1] - 736:16 swear [1] - 627:4 swerve [1] - 655:25 swerved [2] - 621:24, 658:21 switch [1] - 818:10 switchback [1] - 654:24 switching [1] - 783:7 sworn [6] - 682:20, 693:12, 740:25, 741:3, 744:4, 768:21 SWORN [1] - 627:6 sympathy [3] - 741:16, 757:21, 768:13 synonymous [1] - 620:24 system [3] - 741:6, 741:15, 763:24</p>	<p>T</p> <p>tac [2] - 710:25, 711:1 tactically [1] - 611:11 tactics [4] - 611:8, 615:13, 629:6, 684:8 talks [2] - 675:20, 678:13</p>	<p>tally [1] - 645:22 tangible [1] - 753:12 tardy [1] - 738:19 target [1] - 636:12 taught [1] - 636:13 taunt [1] - 782:3 teacher [1] - 820:14 technically [1] - 818:22 technology [2] - 729:15, 783:7 television [4] - 647:24, 648:1, 655:10, 667:4 temporary [1] - 753:20 ten [13] - 640:2, 654:24, 660:23, 661:17, 665:10, 666:9, 686:24, 715:6, 717:23, 724:20, 789:10, 789:18, 822:21 ten-minute [1] - 789:10 tendered [2] - 718:24, 719:5 Tennessee [9] - 644:14, 647:19, 722:2, 779:7, 779:16, 779:22, 784:17, 823:12 tense [3] - 645:1, 672:23, 736:18 term [8] - 652:4, 670:1, 670:2, 670:8, 702:13, 702:14, 710:14, 817:6 termed [1] - 753:7 terminate [1] - 655:18 terms [11] - 619:25, 620:24, 638:24, 643:24, 678:12, 689:17, 701:25, 705:21, 708:21, 732:13, 796:15 terrible [1] - 823:18 test [4] - 742:22, 749:20, 768:24, 808:23 testified [45] - 614:24, 615:20, 621:22, 635:3, 643:15, 648:23, 671:20, 672:5, 676:12, 685:19, 693:4, 693:19, 697:21, 701:17, 703:8, 703:10, 709:23, 713:2, 746:1, 747:13, 766:5,</p>	<p>766:11, 766:12, 781:23, 794:2, 796:25, 797:18, 798:16, 800:5, 800:24, 801:2, 801:6, 801:11, 801:23, 802:5, 803:8, 803:22, 804:21, 808:4, 808:5, 809:3, 811:2, 811:13, 813:17, 821:3 testify [9] - 677:8, 677:9, 677:21, 686:13, 703:18, 703:24, 744:18, 765:5, 765:18 testifying [7] - 619:24, 653:23, 662:10, 701:4, 708:23, 746:10, 746:24 testimony [110] - 609:24, 610:19, 622:12, 624:10, 624:13, 631:25, 634:6, 635:6, 637:23, 638:20, 641:25, 642:22, 654:7, 654:10, 656:7, 656:20, 656:25, 657:12, 658:20, 659:20, 661:12, 662:22, 671:19, 675:2, 675:6, 675:17, 676:15, 677:24, 678:5, 678:8, 679:16, 679:17, 683:18, 683:19, 689:25, 693:1, 693:12, 693:20, 694:6, 694:7, 694:9, 694:19, 696:18, 697:20, 700:19, 700:21, 704:3, 705:6, 706:18, 706:22, 706:23, 709:5, 709:14, 711:2, 711:12, 711:13, 712:13, 713:1, 730:17, 731:16, 731:21, 731:23, 733:16, 736:24, 737:14, 738:1, 743:6, 744:4, 744:25, 745:1, 745:10, 745:11, 745:12, 745:20, 745:23, 746:5, 746:6, 746:18, 746:22, 747:1,</p>	<p>747:2, 747:4, 747:11, 747:15, 747:16, 766:21, 774:14, 781:9, 782:5, 782:9, 785:8, 791:18, 796:6, 798:5, 798:6, 798:7, 798:10, 798:15, 798:16, 800:19, 800:24, 801:4, 803:14, 805:5, 809:21, 812:11 tests [1] - 644:23 text [2] - 643:23, 665:16 THE [169] - 609:2, 609:10, 613:7, 613:11, 613:16, 613:18, 616:9, 616:21, 617:14, 619:22, 620:3, 620:10, 620:12, 621:19, 622:5, 622:20, 622:24, 623:3, 623:13, 623:17, 623:20, 624:6, 624:20, 625:6, 625:9, 625:16, 625:25, 626:5, 626:8, 626:10, 626:14, 626:18, 627:3, 627:7, 637:15, 637:19, 638:22, 639:1, 639:4, 639:6, 639:9, 649:25, 679:1, 680:2, 680:6, 680:17, 681:1, 681:11, 681:18, 681:21, 681:25, 685:12, 689:23, 690:2, 690:4, 711:25, 712:2, 712:4, 713:17, 713:20, 713:23, 713:25, 714:1, 714:2, 714:19, 714:22, 714:24, 715:17, 715:23, 719:3, 719:7, 719:14, 719:23, 720:2, 720:4, 720:25, 721:6, 721:25, 722:4, 722:11, 723:10, 723:17, 724:16, 724:21, 725:8, 726:5, 726:21, 727:11, 727:21, 728:5, 728:8, 729:6, 729:9, 729:11,</p>
---	---	--	--	--	--

729:13, 730:4, 730:11, 730:14, 730:21, 731:9, 731:20, 732:19, 733:1, 733:11, 733:18, 733:22, 734:6, 734:11, 734:15, 734:19, 734:22, 735:1, 735:3, 735:16, 735:22, 736:3, 737:21, 738:16, 738:18, 739:1, 739:4, 739:7, 739:12, 762:19, 762:22, 762:24, 763:4, 763:8, 763:11, 786:6, 786:23, 787:1, 787:21, 788:1, 789:8, 789:23, 790:3, 796:23, 798:13, 810:24, 822:18, 822:21, 827:19, 828:9, 828:22, 829:5, 829:12, 830:6, 830:11, 830:22, 831:13, 831:15, 831:21, 832:2, 832:14, 832:18, 832:25, 834:1, 834:5, 834:7, 834:9, 834:11, 834:13, 834:15, 834:17, 834:19, 835:12, 835:21, 835:23 themselves [2] - 631:8, 778:11 theories [2] - 777:16, 777:19 theory [15] - 610:17, 611:2, 614:7, 697:23, 701:14, 702:3, 705:18, 707:12, 746:19, 775:1, 775:8, 781:5, 781:12, 805:19, 827:18 therefore [7] - 612:12, 737:20, 748:11, 752:5, 755:11, 755:15, 805:20 thereto [1] - 758:13 thinking [3] - 624:23, 729:1, 786:14 thinks [7] - 648:13, 648:14, 702:24, 801:25, 819:9, 826:13, 826:19	third [3] - 611:16, 630:25, 665:16 thirty [1] - 681:10 Thomas [1] - 607:13 thoughts [4] - 735:11, 829:18, 830:2, 831:13 thousands [5] - 645:3, 650:19, 686:12, 686:17, 691:6 threat [22] - 621:16, 622:6, 622:10, 622:12, 622:19, 625:23, 645:19, 668:17, 669:2, 749:22, 750:17, 750:24, 778:12, 778:15, 778:16, 778:18, 778:21, 778:22, 822:16, 824:10, 825:1, 830:25 threaten [1] - 825:17 three [30] - 613:9, 630:25, 631:11, 638:17, 645:16, 691:24, 693:7, 693:14, 699:15, 699:17, 710:21, 716:15, 717:7, 719:17, 719:24, 738:1, 760:2, 760:6, 768:20, 768:21, 770:23, 771:16, 781:13, 781:14, 786:3, 814:7, 824:12, 829:22, 830:20, 834:7 three-minute [1] - 691:24 threshold [1] - 619:16 throughout [5] - 627:22, 629:20, 658:15, 791:1, 803:13 throw [2] - 773:7, 777:15 thrown [1] - 785:21 thumbnail [1] - 640:10 Tiffany [1] - 607:21 timeline [12] - 610:23, 614:18, 615:20, 706:8, 711:3, 737:12, 766:20, 782:6, 823:3, 825:5, 827:6 timer [2] - 795:20, 795:25 timing [7] - 664:23, 678:6, 678:7,	794:23, 798:17, 799:5, 799:7 tire [10] - 662:20, 663:12, 663:19, 695:17, 695:18, 765:22, 768:9, 815:20, 815:22, 824:23 tires [21] - 615:22, 671:8, 694:24, 695:12, 696:13, 699:6, 699:12, 700:3, 700:10, 700:14, 700:22, 701:5, 768:4, 768:18, 772:9, 775:1, 781:5, 781:7, 823:21, 824:24 title [1] - 661:25 today [26] - 613:1, 631:16, 632:4, 632:7, 633:4, 638:20, 642:16, 642:23, 647:2, 650:12, 653:23, 685:19, 693:1, 706:22, 712:8, 712:13, 714:5, 761:4, 783:10, 786:2, 788:25, 791:1, 792:17, 800:1, 816:18, 835:13 today's [1] - 833:22 Todd [1] - 821:7 together [12] - 626:12, 633:6, 646:8, 681:3, 708:25, 709:5, 715:1, 735:11, 740:6, 767:6, 769:12, 769:23 tolerate [1] - 827:12 tolerated [1] - 619:7 toll [1] - 630:20 took [25] - 615:25, 628:21, 629:25, 633:22, 633:23, 649:1, 649:2, 662:3, 672:8, 707:3, 765:4, 769:5, 770:19, 771:2, 772:15, 774:24, 782:1, 788:3, 788:23, 794:16, 801:13, 812:15, 812:16, 822:16 top [7] - 620:6, 647:20, 691:10, 705:13, 786:3, 806:18, 813:4	topic [4] - 629:13, 646:15, 683:19, 819:23 topics [4] - 628:24, 629:2, 629:10, 634:16 tortuous [2] - 612:8, 612:10 tossing [1] - 665:9 total [8] - 662:7, 666:17, 706:2, 706:3, 760:7, 773:18, 775:23, 819:21 totality [5] - 720:23, 722:16, 722:24, 723:4, 751:20 totally [1] - 667:24 touch [3] - 650:10, 802:16, 807:14 touched [3] - 766:5, 766:6, 805:25 tough [2] - 825:8 tow [2] - 736:10, 769:6 toward [9] - 698:2, 755:16, 759:16, 783:14, 797:25, 803:6, 804:12, 818:13, 833:19 towards [9] - 615:16, 672:3, 703:1, 710:18, 710:19, 710:24, 765:15, 777:8, 823:10 towed [1] - 769:1 town [2] - 635:16, 647:18 track [1] - 662:20 tracks [4] - 638:4, 700:6, 765:24, 772:10 traffic [30] - 620:22, 620:23, 621:1, 621:2, 621:24, 643:10, 643:13, 653:14, 658:21, 663:16, 670:20, 675:13, 690:20, 691:16, 691:21, 703:21, 706:4, 721:13, 722:20, 736:20, 791:24, 792:1, 793:21, 801:14, 813:11, 813:16, 815:2, 818:5, 826:4 trail [2] - 679:7, 795:5 trailer [8] - 785:23, 785:24, 786:1, 786:2, 791:4, 791:6,	791:7 Train [1] - 629:21 train [13] - 628:10, 628:11, 628:18, 629:8, 629:19, 630:18, 633:24, 636:6, 637:3, 646:22, 791:20, 793:6, 816:22 trained [11] - 628:12, 628:15, 628:24, 629:1, 629:4, 629:14, 633:18, 647:23, 670:1, 671:14 Trainer [1] - 629:21 trainer [10] - 628:10, 628:16, 628:18, 629:19, 630:18, 632:15, 633:24, 636:6, 637:3 trainers [7] - 628:12, 629:8, 629:9, 645:9, 647:23, 793:4, 816:20 training [65] - 627:24, 628:1, 628:2, 628:5, 628:25, 629:7, 629:9, 629:16, 630:1, 630:15, 631:14, 632:18, 633:15, 633:16, 633:23, 633:24, 634:1, 634:2, 634:20, 634:22, 636:5, 636:9, 636:23, 637:2, 637:4, 637:6, 637:7, 640:14, 641:13, 643:24, 644:15, 644:20, 645:3, 646:17, 646:24, 647:10, 647:16, 649:8, 660:20, 666:17, 667:12, 668:4, 668:6, 669:18, 670:5, 670:16, 670:21, 670:23, 671:16, 674:21, 676:8, 677:9, 691:1, 691:18, 702:8, 702:14, 702:21, 703:6, 707:5, 708:17, 737:16, 746:18, 791:21, 817:13 Training [4] - 628:3, 628:4, 628:6, 644:20 trains [4] - 793:4,
--	---	--	---	---

<p>793:6, 816:20, 816:22</p> <p>trajectory [4] - 776:14, 802:19, 802:23, 802:25</p> <p>transaction [1] - 745:13</p> <p>transcript [4] - 693:25, 809:18, 836:6, 836:9</p> <p>Transcript [1] - 607:25</p> <p>transcription [1] - 607:25</p> <p>translation [1] - 607:25</p> <p>transmission [30] - 641:21, 656:24, 657:1, 657:5, 657:8, 658:22, 661:8, 661:9, 661:10, 662:14, 675:4, 679:4, 679:6, 703:14, 765:6, 765:8, 765:9, 768:15, 773:3, 773:6, 792:20, 792:21, 792:23, 792:24, 795:4, 800:13, 803:23, 803:24, 804:3</p> <p>transmissions [4] - 703:12, 705:25, 782:10, 794:23</p> <p>transparency [1] - 648:2</p> <p>transpired [12] - 626:17, 680:15, 681:23, 714:17, 739:11, 762:17, 763:10, 789:21, 790:2, 828:21, 832:17, 835:10</p> <p>Transportation [1] - 666:2</p> <p>travel [11] - 640:4, 657:7, 661:16, 662:19, 664:4, 696:1, 697:5, 698:14, 705:24, 710:17, 792:25</p> <p>traveled [5] - 697:1, 697:9, 697:17, 699:9, 803:2</p> <p>traveling [13] - 655:16, 657:6, 660:23, 663:17, 664:14, 664:17, 665:5, 665:10, 665:11, 668:8, 697:20, 793:8, 813:5</p> <p>Travis [1] - 607:17</p>	<p>treat [2] - 704:16, 744:1</p> <p>treated [1] - 728:17</p> <p>trees [1] - 660:7</p> <p>Trent [1] - 612:16</p> <p>trial [56] - 609:4, 610:20, 612:15, 641:25, 658:15, 659:20, 660:18, 666:24, 673:4, 673:5, 675:2, 675:6, 679:17, 693:1, 693:16, 693:20, 693:21, 693:25, 694:1, 694:8, 694:20, 694:21, 698:22, 700:13, 700:19, 701:1, 701:12, 703:17, 709:14, 721:10, 739:18, 741:8, 741:13, 743:3, 744:9, 747:19, 768:18, 771:1, 772:22, 774:18, 774:19, 775:7, 780:9, 781:2, 782:10, 783:10, 791:9, 798:10, 798:15, 810:23, 811:13, 823:17, 827:16, 834:22, 834:24, 835:16</p> <p>Trial [2] - 607:12, 835:25</p> <p>trials [1] - 790:16</p> <p>trick [6] - 768:6, 768:7, 774:18, 774:21, 775:6, 807:15</p> <p>tried [35] - 645:14, 650:19, 668:9, 671:7, 671:9, 673:22, 688:2, 690:15, 720:20, 768:6, 768:7, 768:12, 768:17, 774:18, 774:21, 775:6, 777:21, 779:25, 785:2, 792:17, 792:20, 794:11, 795:10, 795:17, 795:18, 797:5, 804:22, 806:22, 808:14, 816:13, 823:22, 825:2, 826:22</p> <p>tries [1] - 817:21</p> <p>trigger [4] - 689:19, 691:7, 704:24,</p>	<p>824:12</p> <p>Trooper [5] - 628:20, 629:1, 799:3, 807:9, 808:3</p> <p>trooper [5] - 629:5, 629:6, 694:7, 774:8, 774:15</p> <p>truck [1] - 669:23</p> <p>true [3] - 621:6, 727:24, 736:11</p> <p>truly [1] - 785:14</p> <p>trust [3] - 781:10, 781:12, 781:15</p> <p>truth [7] - 663:25, 741:7, 743:5, 745:25, 759:4, 768:12, 782:13</p> <p>try [19] - 641:14, 652:16, 652:18, 659:7, 677:15, 681:14, 767:7, 769:11, 773:8, 780:7, 782:3, 785:15, 785:16, 785:18, 800:19, 823:20, 825:18, 825:25</p> <p>trying [32] - 622:20, 656:6, 668:2, 673:24, 674:5, 688:4, 689:13, 689:24, 696:23, 697:22, 699:18, 764:22, 775:1, 775:24, 776:25, 780:12, 785:18, 786:14, 794:15, 797:2, 805:14, 806:11, 807:14, 815:17, 816:4, 823:2, 823:6, 824:7, 824:8, 825:4</p> <p>tucked [1] - 771:16</p> <p>Tuesday [1] - 739:24</p> <p>turn [18] - 654:17, 654:19, 654:24, 663:6, 663:7, 672:15, 674:15, 677:14, 677:15, 699:17, 710:21, 741:12, 767:21, 770:23, 771:16, 791:12, 814:7</p> <p>turned [5] - 621:25, 630:24, 661:10, 696:5, 773:24</p> <p>turning [2] - 615:12, 695:8</p> <p>twice [1] - 824:11</p> <p>two [44] - 612:3,</p>	<p>613:5, 618:25, 619:15, 620:16, 653:20, 653:24, 654:20, 655:12, 657:14, 663:4, 666:9, 666:11, 674:17, 686:6, 692:15, 695:14, 710:14, 716:10, 717:4, 729:1, 738:2, 743:4, 745:12, 746:14, 754:3, 755:10, 760:9, 760:14, 760:20, 760:23, 761:1, 769:8, 769:9, 771:3, 776:24, 782:19, 784:20, 786:3, 788:4, 799:19, 809:4, 834:5</p> <p>two-year [1] - 612:3</p> <p>type [4] - 648:20, 753:6, 773:21, 775:16</p> <p>types [1] - 743:4</p> <p>typically [3] - 704:8, 830:18, 833:4</p>	<p>639:3, 639:5, 639:8, 680:5, 681:10, 681:17, 682:3, 682:5, 682:23, 685:9, 685:13, 685:14, 690:3, 690:6, 690:7, 712:1, 713:22, 714:23, 719:2, 719:13, 733:2, 733:23, 734:10, 734:13, 734:18, 734:25, 735:14, 738:17, 739:3, 762:21, 763:6, 763:13, 786:7, 786:22, 786:25, 787:2, 787:20, 787:23, 788:3, 796:21, 798:9, 810:21, 811:1, 822:22, 827:20, 829:3, 830:4, 830:15, 831:14, 832:12, 835:20</p> <p>Umina's [1] - 713:11</p> <p>Umina.....</p> <p>.....157 [1] - 608:8</p> <p>Umina.....74 [1] - 608:6</p> <p>unanimous [7] - 758:14, 761:7, 832:5, 832:9, 833:10, 833:15, 834:19</p> <p>unanimously [2] - 761:11, 832:23</p> <p>unavoidable [8] - 621:17, 622:10, 622:12, 622:18, 625:23, 778:17, 778:21</p> <p>uncertainty [2] - 757:23, 758:2</p> <p>unchangeable [3] - 687:15, 706:21, 772:13</p> <p>uncommon [2] - 745:15, 811:11</p> <p>uncontradicted [1] - 745:2</p> <p>under [45] - 609:20, 610:10, 611:14, 613:7, 613:20, 618:8, 620:7, 620:8, 621:15, 625:21, 628:5, 630:21, 634:17, 638:17, 639:14, 682:1, 682:16, 693:8,</p>
---	---	--	--	---

U

U.S [2] - 609:20, 612:17

ultimate [1] - 711:22

Umina [37] - 607:15, 607:15, 616:21, 617:19, 619:22, 620:14, 622:5, 623:13, 626:3, 626:8, 637:16, 680:3, 681:8, 681:16, 682:2, 682:6, 690:5, 711:25, 712:7, 712:25, 713:21, 719:1, 719:10, 733:1, 734:6, 734:24, 738:16, 739:1, 762:20, 763:12, 786:6, 786:24, 789:8, 802:18, 818:11, 822:21, 827:19

UMINA [68] - 613:20, 616:10, 619:23, 620:9, 620:15, 622:6, 622:22, 622:25, 623:5, 623:14, 625:8, 625:17, 626:4, 626:9, 637:17, 637:21, 638:24,

<p>702:10, 709:12, 717:5, 722:9, 728:17, 736:7, 738:3, 740:23, 743:23, 748:6, 748:11, 748:21, 748:24, 748:25, 749:14, 749:18, 750:20, 751:24, 761:9, 769:7, 779:6, 779:19, 779:20, 781:14, 801:3, 831:23, 836:12</p> <p>undercover [1] - 630:5</p> <p>underestimate [1] - 735:18</p> <p>underlying [1] - 750:9</p> <p>underneath [1] - 760:6</p> <p>Understood [3] - 622:5, 726:5, 730:4</p> <p>understood [26] - 613:11, 613:16, 616:21, 617:14, 624:6, 625:6, 637:15, 637:19, 639:4, 639:9, 690:4, 720:25, 722:11, 723:6, 725:24, 726:17, 726:21, 727:11, 730:11, 730:21, 731:9, 731:20, 732:19, 735:16, 739:9, 830:11</p> <p>undone [1] - 669:24</p> <p>unexpected [2] - 665:23, 665:25</p> <p>unfortunately [3] - 671:9, 806:11, 819:16</p> <p>uniform [2] - 630:3, 684:5</p> <p>unimportant [1] - 745:17</p> <p>unit [1] - 655:15</p> <p>United [17] - 614:10, 630:6, 631:9, 669:18, 763:17, 763:21, 776:3, 778:2, 779:20, 779:21, 780:6, 782:25, 784:6, 788:22, 836:4, 836:11, 836:15</p> <p>UNITED [1] - 607:1</p> <p>Unites [1] - 631:12</p> <p>University [2] - 630:11, 630:12</p> <p>university [1] - 662:8</p>	<p>unknown [8] - 645:2, 658:9, 668:8, 675:13, 707:9, 707:16, 708:2, 804:16</p> <p>unknowns [3] - 706:2, 706:3, 706:5</p> <p>unless [6] - 616:4, 645:5, 735:22, 750:15, 777:4, 778:23</p> <p>unlikely [1] - 767:20</p> <p>unnecessary [1] - 717:6</p> <p>unpublished [1] - 612:15</p> <p>unquestionable [1] - 770:16</p> <p>unreasonable [13] - 675:24, 676:2, 685:22, 702:12, 702:15, 703:3, 750:12, 770:18, 783:15, 783:19, 818:15, 833:21</p> <p>unreasonably [3] - 702:7, 702:18, 702:19</p> <p>unrelated [2] - 825:19</p> <p>unreliable [1] - 667:24</p> <p>untrue [1] - 774:14</p> <p>untruthfulness [1] - 746:4</p> <p>unwilling [1] - 817:3</p> <p>up [134] - 615:9, 615:10, 619:20, 627:17, 628:21, 628:23, 628:25, 630:7, 631:8, 631:12, 633:24, 640:14, 640:22, 640:23, 641:21, 643:9, 646:25, 647:10, 647:14, 649:3, 660:18, 661:17, 661:24, 662:8, 665:19, 667:2, 667:5, 667:7, 668:13, 670:12, 671:19, 674:12, 687:11, 693:10, 694:13, 695:5, 695:19, 695:20, 695:24, 696:5, 696:23, 697:7, 699:14, 699:25, 704:15, 704:17, 710:14, 710:19, 715:11, 716:2, 720:10, 720:24,</p>	<p>722:22, 722:23, 730:1, 733:24, 734:2, 735:11, 735:25, 737:3, 738:13, 738:23, 739:2, 756:15, 761:25, 762:15, 764:17, 767:5, 767:22, 767:23, 767:25, 769:15, 769:25, 770:9, 770:10, 770:22, 770:24, 771:5, 771:10, 771:13, 772:6, 772:11, 773:2, 773:6, 774:5, 775:24, 776:23, 777:3, 778:5, 779:12, 780:21, 784:22, 785:2, 785:15, 787:21, 788:7, 791:7, 795:5, 797:13, 797:16, 797:21, 798:22, 801:11, 803:7, 803:21, 804:7, 804:19, 809:8, 810:24, 811:16, 811:17, 812:18, 815:3, 815:10, 815:12, 820:6, 820:23, 821:9, 821:23, 823:5, 823:16, 823:22, 824:16, 824:23, 825:18, 825:25, 827:13, 827:14, 827:15, 835:19</p> <p>update [1] - 725:9</p> <p>updates [1] - 649:11</p> <p>upheaval [1] - 648:3</p> <p>upset [1] - 782:8</p> <p>urgent [1] - 820:15</p> <p>US [1] - 725:9</p> <p>useless [1] - 662:1</p> <p>useless-meaning [1] - 662:1</p> <p>usual [2] - 680:18, 729:16</p> <p>utilize [2] - 614:17, 778:23</p> <p>utilized [1] - 614:9</p> <p>utilizing [4] - 607:25, 699:24, 751:1, 765:2</p> <p>utterance [1] - 641:20</p> <p>utterly [1] - 815:8</p>	<p>vague [1] - 623:9</p> <p>value [3] - 690:17, 691:18, 788:18</p> <p>vantage [1] - 806:16</p> <p>variables [5] - 707:16, 707:18, 707:19, 707:23, 707:24</p> <p>various [2] - 816:20, 816:21</p> <p>varying [1] - 738:2</p> <p>veer [4] - 696:10, 697:1, 700:4, 765:16</p> <p>veering [2] - 697:5, 698:13</p> <p>vegetation [4] - 696:14, 696:15, 771:14, 772:2</p> <p>vehicle [90] - 614:8, 614:22, 614:24, 615:2, 615:17, 615:18, 615:19, 615:25, 621:24, 622:1, 622:3, 624:3, 625:4, 655:20, 655:24, 655:25, 656:23, 661:11, 661:14, 661:19, 661:20, 663:16, 664:20, 666:1, 666:8, 669:25, 670:17, 671:1, 671:3, 671:25, 672:19, 674:2, 677:11, 677:13, 677:15, 677:18, 695:7, 696:17, 697:4, 697:8, 700:6, 703:9, 705:1, 705:3, 708:1, 708:2, 709:18, 710:10, 711:14, 721:11, 737:5, 751:16, 764:21, 764:22, 765:6, 765:13, 766:4, 766:7, 766:19, 771:8, 773:5, 775:4, 775:12, 775:14, 775:16, 775:18, 776:12, 776:25, 777:6, 779:9, 779:10, 780:3, 784:3, 785:1, 793:12, 794:5, 796:16, 796:17, 796:20, 814:9, 814:10, 814:12, 814:13, 814:17, 826:8, 827:5, 827:22, 827:25</p>	<p>vehicles [14] - 657:10, 657:17, 670:20, 678:20, 704:2, 704:6, 709:21, 765:12, 765:17, 765:19, 766:1, 797:1, 807:19, 816:5</p> <p>verbal [2] - 710:22, 710:23</p> <p>verbalization [1] - 629:11</p> <p>verbiage [1] - 622:15</p> <p>verdict [84] - 617:22, 716:13, 719:21, 719:24, 720:13, 724:23, 729:24, 729:25, 730:5, 732:9, 732:21, 732:23, 733:5, 733:12, 733:14, 733:20, 734:14, 734:17, 734:20, 734:23, 734:24, 739:6, 741:1, 741:4, 741:8, 741:20, 743:16, 745:7, 751:5, 751:10, 754:4, 755:3, 758:11, 758:12, 758:13, 758:25, 759:9, 759:11, 759:21, 760:21, 761:6, 761:7, 761:10, 761:13, 782:15, 782:19, 783:6, 783:8, 783:11, 818:10, 819:5, 819:16, 821:10, 821:18, 828:14, 831:1, 831:20, 832:4, 832:6, 832:9, 832:21, 832:23, 832:25, 833:4, 833:9, 833:10, 833:13, 833:14, 833:16, 833:22, 834:3, 834:5, 834:7, 834:9, 834:11, 834:13, 834:15, 834:17, 834:19, 834:20, 835:14</p> <p>VERDICT.....226 [1] - 608:10</p> <p>version [11] - 614:20, 615:24, 716:3, 716:21, 718:21, 719:8, 721:8, 765:13, 767:3,</p>
--	--	--	--	--

V

VA [1] - 612:5

<p>767:14, 808:14 versus [10] - 645:16, 648:13, 658:10, 667:14, 667:16, 736:10, 736:13, 806:19, 810:18, 811:3 vicinity [1] - 625:22 video [5] - 642:24, 677:7, 677:8, 808:5, 811:13 videos [1] - 664:2 view [6] - 617:20, 653:18, 758:15, 758:21, 806:10, 806:15 viewed [1] - 613:21 Village [1] - 631:2 violate [6] - 610:13, 763:16, 764:1, 764:3, 764:4, 825:24 violated [9] - 702:5, 702:11, 754:8, 770:18, 777:23, 782:24, 782:25, 788:21, 827:13 violation [7] - 626:2, 750:11, 754:9, 780:22, 784:5, 823:11, 825:10 violence [3] - 631:9, 631:12, 758:16 VIRGINIA [1] - 607:2 Virginia [28] - 607:13, 612:4, 612:5, 612:14, 612:18, 612:23, 616:11, 628:14, 628:18, 629:15, 635:3, 636:3, 643:2, 649:13, 654:16, 654:23, 718:17, 727:3, 727:9, 727:10, 728:20, 751:15, 751:25, 786:4, 793:7, 808:16, 836:5, 836:16 virtually [1] - 633:18 visible [2] - 665:7, 694:24 vision [3] - 636:16, 677:12, 750:3 Vision [1] - 665:16 visit [10] - 640:22, 640:25, 641:3, 641:5, 641:11, 642:10, 644:1, 660:13, 660:14, 660:17</p>	<p>visited [3] - 642:3, 642:9, 701:7 visual [3] - 695:12, 751:17, 780:2 visually [1] - 795:10 vital [2] - 731:18, 805:12 vividly [1] - 787:14 voice [4] - 641:21, 641:23, 794:1, 795:1 voir [1] - 637:15 voluntary [2] - 683:4 vs [14] - 610:10, 612:16, 635:9, 644:14, 644:18, 647:19, 675:7, 683:21, 702:22, 713:1, 722:2, 725:2, 736:16, 779:22</p> <p style="text-align: center;">W</p> <p>Wade [1] - 609:20 wait [5] - 622:2, 690:12, 735:8, 767:21, 829:9 waiting [4] - 627:20, 703:18, 715:3, 769:22 walk [4] - 640:17, 641:11, 813:24 walked [5] - 673:12, 693:10, 694:13, 772:21, 792:2 walking [5] - 642:8, 654:2, 705:7, 705:12, 705:13 walks [1] - 824:14 wall [2] - 773:7, 830:8 wants [8] - 767:1, 769:13, 772:12, 772:13, 792:12, 792:24, 804:16, 807:5 warm [2] - 831:2, 831:9 warning [4] - 750:19, 750:21, 787:22, 828:16 warrant [1] - 630:8 wash [1] - 809:9 washed [4] - 768:25, 808:20, 808:24, 809:8 watch [2] - 667:4 watched [2] - 823:20, 823:21 watches [1] - 710:20 ways [2] - 805:12, 805:15</p>	<p>weapon [16] - 648:20, 658:2, 737:6, 796:10, 796:15, 796:16, 796:17, 800:8, 801:19, 803:5, 808:22, 809:1, 809:11, 811:16, 811:18, 814:19 wear [1] - 825:12 website [1] - 647:25 week [6] - 638:11, 659:21, 673:6, 790:9, 791:1, 796:18 weeks [1] - 774:9 weighed [1] - 777:21 weighing [2] - 745:15, 746:22 weights [1] - 742:11 weight [10] - 652:2, 674:20, 742:8, 742:14, 744:25, 746:9, 747:2, 756:22, 758:23, 764:12 welcome [3] - 646:3, 790:22, 835:3 welfare [1] - 755:18 well-known [1] - 636:13 wells [1] - 771:14 Wesley [1] - 657:13 west [1] - 631:11 WEST [1] - 607:2 West [27] - 607:13, 612:4, 612:14, 612:18, 612:23, 616:10, 628:14, 628:18, 629:15, 635:3, 636:3, 643:2, 649:13, 654:16, 654:23, 718:16, 727:3, 727:9, 727:10, 751:15, 751:24, 786:4, 793:7, 808:16, 836:5, 836:16 wet [1] - 768:3 whatnot [4] - 640:4, 651:3, 670:13, 670:21 whatsoever [6] - 624:5, 679:18, 770:11, 777:17, 801:9, 817:7 wheel [9] - 654:17, 654:20, 672:15, 695:19, 696:5, 698:1, 698:25, 699:1, 771:14</p>	<p>Wheeler [1] - 657:13 wheels [1] - 771:7 whip [1] - 767:13 white [3] - 769:12, 780:13, 781:14 whiteboard [1] - 666:14 whole [4] - 634:16, 740:15, 753:13, 826:1 wife [4] - 627:18, 654:18, 657:25, 673:1 wiggle [1] - 688:2 willing [3] - 640:12, 681:6, 817:4 willingness [2] - 741:6, 834:25 window [3] - 610:4, 668:13, 710:17 wisdom [1] - 740:24 wise [1] - 724:8 wish [2] - 803:20, 804:8 withdraw [1] - 734:13 WITNESS [3] - 608:4, 627:6, 714:1 witness [51] - 615:10, 621:22, 626:25, 631:14, 631:16, 631:20, 631:25, 632:7, 635:2, 639:13, 640:19, 642:5, 680:23, 687:1, 694:8, 708:14, 745:2, 745:4, 745:5, 745:7, 745:8, 745:11, 745:20, 745:25, 746:1, 746:5, 746:7, 746:14, 746:16, 747:8, 747:10, 747:12, 747:16, 763:19, 765:5, 768:11, 774:22, 774:23, 781:23, 791:19, 796:8, 800:22, 801:3, 802:21, 810:5, 812:10, 812:13, 815:7, 820:4 witness's [4] - 745:3, 747:1, 747:11, 747:15 witnessed [1] - 624:2 witnesses [14] - 610:20, 639:15, 642:23, 675:18, 714:19, 742:23, 744:5, 744:16,</p>	<p>744:17, 744:25, 745:11, 746:10, 746:12, 818:23 witnesses' [1] - 747:4 witnessing [3] - 745:13, 806:4, 811:6 women [1] - 825:16 word [18] - 620:21, 630:22, 636:25, 656:6, 684:14, 694:10, 779:12, 781:10, 781:13, 781:15, 785:20, 785:23, 785:24, 789:11, 819:19, 823:24, 830:13 words [14] - 620:20, 641:16, 645:5, 646:7, 652:12, 657:5, 665:18, 665:23, 670:8, 677:11, 692:2, 695:1, 708:18, 744:16 works [7] - 650:12, 766:22, 768:15, 800:13, 817:24, 833:4, 833:11 world [2] - 636:14, 815:11 worried [2] - 782:16, 825:5 worry [2] - 625:13, 790:17 worse [1] - 788:10 worth [5] - 741:22, 783:24, 786:10, 786:12, 788:19 worthy [1] - 746:12 wound [4] - 633:24, 776:6, 776:9, 776:14 wow [1] - 685:9 Wrangler [1] - 813:4 wrap [1] - 787:21 wrestling [3] - 635:13, 652:22, 653:2 write [1] - 761:15 writing [2] - 640:4, 761:18 written [8] - 635:23, 642:18, 676:14, 730:25, 761:9, 780:14, 797:11, 812:9 wrongdoer [2] - 755:9, 755:10 wrongdoers [1] - 755:13 wrongful [13] - 609:14, 612:21,</p>
---	--	---	---	---

613:4, 613:6, 613:8, 616:17, 618:22, 751:25, 752:1, 752:2, 752:5, 752:8, 755:16 wrote [6] - 642:14, 642:15, 684:18, 693:11, 695:1, 695:11 WV [3] - 607:16, 607:19, 607:23	Z zero [3] - 685:21, 686:4, 797:17
Y	
yard [1] - 787:16 yards [1] - 690:9 year [9] - 612:3, 631:4, 638:13, 645:4, 683:8, 685:1, 782:19, 788:18, 820:23 years [26] - 630:20, 630:21, 631:5, 631:11, 637:8, 660:13, 660:17, 666:24, 667:10, 686:6, 712:24, 771:18, 774:12, 782:2, 786:15, 786:17, 787:10, 788:20, 789:2, 793:4, 809:4, 814:25, 817:11, 820:6, 824:3, 827:24 yelling [1] - 787:9 yellow [3] - 652:22, 652:23, 653:1 yellowish [2] - 651:7, 652:11 yesterday [15] - 609:6, 617:25, 634:5, 634:20, 648:23, 650:10, 654:7, 656:8, 659:1, 675:18, 723:21, 774:11, 788:24, 816:13 YMCA [1] - 809:7 young [2] - 630:13, 769:5 youngest [1] - 821:4 yourself [6] - 627:14, 638:3, 740:24, 758:17, 814:21, 825:9 yourselves [3] - 680:12, 680:13, 789:14	